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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

4	PERSONAL AUDIO, LLC	DOCKET NO. 2:13CV13
5	VS.	APRIL 24, 2014
6	TOGI ENTERTAINMENT,	9:04 A.M.
7	ET AL	MARSHALL, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 125

10 | REPORTER'S TRANSCRIPT OF CLAIM CONSTRUCTION HEARING

BEFORE THE HONORABLE ROY PAYNE
UNITED STATES MAGISTRATE JUDGE

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1 (OPEN COURT, ALL PARTIES PRESENT.)

2 THE COURT: For the record, we're here for the
3 claim construction hearing in *Personal Audio versus Togi*
4 *Entertainment* which is Case No. 2:13-13 on our docket.

5 Would counsel state their appearances for the
6 record.

7 MR. WARD: Good morning, your Honor. John
8 Ward for the plaintiff. At our table is Mr. Brad Liddle,
9 our CEO and general counsel; Mr. Papool Chaudhari;
10 Mr. Merton Thompson; and Jeremy Pitcock who will be doing
11 our presentation, your Honor. We are ready to proceed.

12 THE COURT: All right. Thank you, Mr. Ward.

13 MS. AINSWORTH: Good morning, your Honor.
14 Jennifer Ainsworth on behalf of the Defendants CBS
15 Corporation, NBCUniversal Media, FOX Broadcasting
16 Company, and FOX Networks Group; and with me are lead
17 counsel Steve Lieberman --

18 MR. LIEBERMAN: Good morning, your Honor.

19 MS. AINSWORTH: -- Sharon Davis --

20 MS. DAVIS: Good morning, your Honor.

21 MS. AINSWORTH: -- Brian Rosenbloom --

22 MR. ROSENBOOM: Good morning.

23 MS. DAVIS: -- and from CBS, Mr. Dan Wan.

24 MR. WAN: Good morning, your Honor.

25 THE COURT: Good morning. Thank you,

1 Ms. Ainsworth.

2 MR. SMITH: And, your Honor, for Defendant
3 Howstuffworks.com, Michael Smith, Larry Phillips, and our
4 lead counsel Mr. Jason Lo who will be presenting today.
5 We are ready to proceed, your Honor.

6 THE COURT: All right. Good morning. Thank
7 you, Mr. Smith.

8 MR. ACOSTA: Good morning, your Honor, Matt
9 Acosta for Defendant Lotzi Digital, Inc.; and we are
10 ready to proceed.

11 THE COURT: Thank you, Mr. Acosta.

12 MR. MONTGOMERY: Good morning, your Honor.
13 Dru Montgomery, for a partnership consisting of Adam
14 Carolla, Donny Misraje, and Sandy Ganz. We are ready to
15 proceed, your Honor.

16 THE COURT: Thank you, Mr. Montgomery.

17 All right. I want to note for the record that
18 earlier this morning we provided to counsel a set of
19 preliminary constructions and I want to make sure
20 everyone understands that the purpose of those
21 constructions is not to predetermine the outcome of this
22 but rather to focus the argument and the presentation on
23 the issues that the parties have with where the court is
24 now. These preliminary constructions represent our
25 initial conclusions based on a review of the briefs and

1 the record, and we put them out there with the belief
2 that we're willing to be talked out of any of these if
3 the parties have contrary positions. So, I'm not trying
4 to cut off any argument but rather simply to focus it and
5 hope that it will help the court understand your
6 positions better.

7 So, with that, I'll say that any party that
8 wants to make a general presentation briefly about the
9 overall matters involving the technology, you're welcome
10 to do so. Otherwise, I'd appreciate it if we could
11 present the arguments on a term-by-term basis. And I'll
12 turn it over to the plaintiff first with that in mind.

13 MR. PITCOCK: Your Honor, we don't think
14 there's any need for a technology tutorial; so, we're
15 happy to defer to discussion of the claim terms.

16 THE COURT: Okay. Does anyone else want to
17 take up something before we get to the terms?

18 MR. LIEBERMAN: Your Honor, the defendants are
19 prepared to jump right into the claim terms.

20 THE COURT: Okay. Thank you. In that case,
21 we'll go ahead and start.

22 Mr. Pitcock, if you want to address the first
23 term.

24 MR. PITCOCK: So, I don't know if you want us
25 to go back and forth on each term in the order presented

1 in the sheet, your Honor. Is that your preference?

2 THE COURT: I do want to go back and forth on
3 each term; but if you have an order that you think would
4 be the most productive to present the terms, you're
5 welcome to take them on in any order.

6 MR. PITCOCK: Okay. I'm happy to go in this
7 order, your Honor.

8 THE COURT: Okay.

9 MR. PITCOCK: I think it would probably be
10 just as simple to go through it, and that would allow the
11 defense to go back and forth.

12 We have no problem with your construction of
13 either "episodes" or "media file." And, so, I will turn
14 it over to the other side if they want to address those
15 terms.

16 THE COURT: Let me ask you one general
17 question, Mr. Pitcock.

18 MR. PITCOCK: Sure.

19 THE COURT: I saw in the briefs the note that
20 all of these terms come from claim 31. Are there other
21 claims that are asserted besides claim 31?

22 MR. PITCOCK: There are, your Honor. There
23 are three dependent claims from claim 31, but claim 31 is
24 the only independent claim.

25 THE COURT: 32 through 34, then?

1 MR. PITCOCK: Yes, correct.

2 THE COURT: Okay. All right. Thank you.

3 MR. LO: Good morning, your Honor. Jason Lo
4 on behalf of the defendants. Let me begin by saying that
5 with respect to "media file," the defendants take no
6 position -- or have no problems with the proposal
7 suggested by your Honor; and, so, we have no dispute on
8 "media file."

9 With respect to the claim term "episodes," we
10 don't think that the court's construction is incorrect
11 insofar as what is there. In other words, we don't
12 disagree that an episode is at least a program that is
13 part of a series. I think the only dispute between the
14 parties at this point is whether the word "audio" needs
15 to be added in front of the court's proposed
16 construction. Personal Audio takes the view that it does
17 not need to be. We take the view that it does need to
18 be. That's the only modification I think we are arguing
19 about is whether to add the word "audio" in front of it.

20 THE COURT: And why would that term -- if
21 "audio" needs to be in it, why would it be in "episodes"
22 as -- you know, we addressed that in the "media file"
23 term, but I'm wondering what it is about "episodes" that
24 you think requires that the court address whether it's
25 audio or not.

1 MR. LO: Sure. So, let me take it back one
2 step. One of the disputes that have been at issue in
3 terms of "episodes" was whether the phrase "episodes"
4 must be coterminous with the term "media file." And I
5 take it from the court's construction that the court is
6 not taking the view that simply because those two terms
7 are in the same phrase, one representing the other, they
8 must necessarily mean the same thing.

9 The Federal Circuit has on multiple occasions
10 said that claim terms in the claim limitations in the
11 same claim are presumed to have different meanings. In
12 even just everyday speaking, you know, we may say the
13 phrase "legislator representing a district." That
14 doesn't mean that the word "legislator" and the word
15 "district" are coterminous with each other. They can
16 represent one thing and have a different scope or a
17 different typology. A legislator is a person; a district
18 is an area defined by geographic boundaries. So, to
19 begin with, I -- I don't think there's any dispute now
20 between the parties and/or with the court that those two
21 terms need not mean the same thing.

22 So, then the court's question is, well, if
23 we're going to look at this from the perspective of
24 whether it is audio only, why does that come into the
25 word "episodes"? And I think that also goes with our

1 agreement with the court's construction. "Episodes" is
2 where in the claims the patentee defines what type of
3 program is at issue; and that's built into the court's
4 construction that episode is talking about the
5 programming that is at issue in the invention. It
6 doesn't really appear in any -- that concept doesn't
7 really appear in any other claim term other than that
8 it's programming. And when we look at the type of
9 programming that the patent is describing and that the
10 inventor says "Here is the programming that I am claiming
11 to be part of my invention," it is clear that he made
12 clear that the programming at issue was audio
13 programming.

14 We cited it throughout our brief, and it's
15 really undisputed that these were the statements that
16 were made. It comes up in the Field of the Invention.
17 They say that it "relates to electronic information
18 distribution systems and more particularly to a system
19 for dynamically and interactively selecting and playing
20 particular programs from a program library." So, that's
21 what they're talking about. It's what kind of programs
22 are at issue.

23 And when they go on to the Summary of the
24 Invention, they say "The present invention takes the form
25 of an audio program player." So, it goes back to the

1 word "program." It's used synonymously with the word
2 "episode."

3 And when we get to what they describe as the
4 preferred embodiment -- and that occurs in column 4 in
5 the detailed description portion, starting at line 39,
6 talking about what the patentee calls "the illustrative
7 embodiment" -- the patentee says it "utilizes the
8 Internet to provide communications between a host
9 computer indicated generally at 101 and an audio player
10 device illustrated at 103.

11 So, throughout the patent when they're
12 defining what type of programming, they are trying to
13 define what type of programming the players are intended
14 to play, they are saying that it is audio programming;
15 and that's why we think that the "audio" limitation goes
16 in with the word "episodes."

17 We've provided to the court a copy of slides
18 that we prepared for today's hearing, and I will refer
19 the court first to page 6 of those slides.

20 THE COURT: All right.

21 MR. LO: In our briefing we cite to, among
22 other cases, the AstraZeneca case and the *Retractable*
23 *Technologies* case. And what we've done in Slide 6 is
24 simply put side by side what the specification in
25 AstraZeneca says and what the specification says in the

1 '504 patent. In *AstraZeneca* the inventors made a
2 statement that "The present invention refers to," and
3 they list six different types of salts. Importantly and
4 relevant here, the claim language doesn't say anything
5 about what kind of salt. It just says a "pure solid
6 state alkaline salt." The Federal Circuit in that case
7 said, you know, "We don't disagree that in ordinary usage
8 'alkaline salt' is not limited to the six types of things
9 that they listed in the specification." But, yet, the
10 Federal Circuit concluded that when you say that the
11 present invention refers to these six types of salts,
12 that limits your claim even if your claim language is
13 broader.

14 And here in the '504 patent, you have very
15 similar language, "The present invention takes the form
16 of an audio program player which automatically plays a
17 predetermined schedule of audio program segments"; and
18 you have similarly broad claim language. We don't
19 dispute that if you were looking at this in a vacuum,
20 without looking at the specification, the word "episodes"
21 could have a broader meaning.

22 THE COURT: Now, you are -- what you're really
23 after is a negative limitation, isn't it? That it's only
24 audio.

25 MR. LO: That is correct, your Honor.

1 THE COURT: That it can't be more than that.
2 MR. LO: That's correct. And that's -- and
3 the -- what your Honor is coining as the negative
4 limitation is exactly what was at issue in *AstraZeneca*,
5 and it's exactly what was at issue in the *Retractable*
6 *Technologies* case. The question is: When you have claim
7 language or claim terms that in and of themselves in a
8 vacuum are broad, does the specification enlighten what
9 those broad claim terms mean and in some cases does what
10 you say in the specification limit what you can now call
11 your invention as part of your claims? That's precisely
12 the issue that's presented in both *AstraZeneca* and in
13 *Retractable Technologies*.

14 On the next slide what we have done, your
15 Honor, is again just compared the specification language
16 that was at issue in *Retractable Technologies*. That one
17 had to do with a syringe, and the question was does the
18 syringe have a one-piece body or a multiple-piece body.
19 And again the claim language is absolutely broad -- it
20 just says you've got to have a body -- but the court
21 looked at the summary of the invention which says "Here
22 is what the invention is, it's a tamperproof syringe and
23 the syringe features a one-piece hollow body and on the
24 basis of those statements alone, the Federal Circuit
25 found that your body -- claim limitations in the claims

1 are limited by what you said in the specification is your
2 invention.

3 Personal Audio's brief never addresses the
4 Summary of the Invention and what they call the
5 "illustrative embodiment." I started the conversation by
6 talking about the fact that "media file" and "episodes"
7 do not have the same meaning. That was the primary --
8 and, frankly, the only -- argument advanced by Personal
9 Audio by saying that -- in saying that the phrase
10 "episodes" should not be limited to "audio." They never
11 addressed why the Summary of the Invention is here and
12 the import of having that language in the patent. There
13 are no cases to the contrary that they cite talking about
14 what you do with the Summary of the Invention and the
15 invention is X type of language in the patent.

16 Just two more things briefly about the cases
17 *AstraZeneca* and about *Retractable Technologies*. First,
18 as I mentioned earlier, your Honor, those cases clearly
19 state that if you have something in the specification
20 that defines what the invention is, that overrides the
21 broad claim language. So, we don't start from the
22 presumption that just because the claim language does not
23 have any particular limitations built in, that somehow
24 the burden is on us to show that there should be a
25 limitation. In both of those cases the claim language

1 was equally vague and equally broad; and the Federal
2 Circuit said, you know, if you've defined your invention
3 in the beginning of your patent as X, that's what we're
4 going to limit you to.

5 The other thing that *AstraZeneca* and
6 *Retractable Technologies* both teach is that the
7 specification overrides any argument of claim
8 differentiation. So, in the *AstraZeneca* case, for
9 example, I think there was a broader claim that just
10 says -- the independent claim just says "salt"; and they
11 actually had a dependent claim that says "salt meaning
12 these six types of salt," which is, you know, precisely
13 what the Summary of the Invention said the invention was
14 limited to. So, even though you have both a broad claim
15 and a narrow claim and you normally would have a claim
16 differentiation argument, the Federal Circuit in both the
17 *Retractable Technologies*, I believe in the *Verizon* case,
18 and certainly in the *AstraZeneca* case says that doesn't
19 override it. You start from the specification. That's
20 what *Phillips* teaches us. If the specification says "My
21 invention is X," that's what you're limited to even if
22 you have a broader claim and a narrower claim that
23 defines a smaller subset of the broad claim language.

24 I'll address one other issue quickly which is
25 it -- the argument that Personal Audio makes in parts of

1 its brief is that in the specification, not in the
2 Summary of the Invention, not in the part where they
3 define the invention, talks about other types of files.
4 They talk about text files, they talk about advertising,
5 and things like that. We don't dispute that. That's
6 absolutely there. But what we are saying is that the
7 specification is clear that when it is talking about the
8 programming, it's talking about audio programming. And
9 when it's talking about things like text files and things
10 like images and things like advertising, those are all
11 things that perhaps in a dependent claim or something
12 like that may accompany the audio programming but they
13 are not a substitute for the audio programming nor are
14 they what the invention defines to be the programming.

15 That appears most clearly on Figure 1, which
16 is what we have up on the slide now. We'll zoom in a
17 little bit so that the court can see that.

18 In Figure 1, which again is described as being
19 the "illustrative embodiment," you can clearly see, your
20 Honor, that what they do is they separate the audio
21 programs, being 131, and other types of data and other
22 types of files that may be stored in other databases, 132
23 being announcements and 133 being text. So, all of those
24 things are in addition to audio programming that you may
25 choose to send over to the user. But when the patent and

1 the claims are talking about the programming, they are
2 talking precisely and narrowly about audio programs. And
3 that appears throughout the claim -- I'm sorry --
4 throughout the specification as well.

5 In column 6, lines 9 to 11, they say
6 "database 131," which is what we just saw was the audio
7 programming, (reading) may be accompanied by text
8 transcripts in text database 133. So, the specification
9 distinguishes between the audio programming database and
10 the text database and says that one may accompany the
11 other but it makes a -- it draws a very clear distinction
12 between those two things and it says that they are very
13 different.

14 So, that -- those portions of the
15 specification do not override what they say as part of
16 the Summary of the Invention. In fact, it confirms our
17 view that because they knew that there were other types
18 of programming that were possible -- in other words, you
19 could have text, you could have -- you could have images,
20 and things like that -- and they described that in other
21 aspects of the specification. Yet, when they're talking
22 about what our invention is, they were very precise and
23 very narrow at not covering the other types of data
24 files. That's why the word "episodes" and the word --
25 and the concept of programming in this patent should be

1 limited to audio programming.

2 And I'll stop there unless the court has any
3 other questions.

4 THE COURT: No. I appreciate that.

5 MR. LO: Thank you.

6 THE COURT: Do any of the other defendants
7 want to be heard on that term?

8 MR. LIEBERMAN: No, your Honor.

9 THE COURT: All right. In that case,
10 Mr. Pitcock, you may respond.

11 MR. PITCOCK: I guess just briefly, your
12 Honor. Looking at the same slide that's up here, program
13 segments may likewise consist of audio, text and/or image
14 segments. I mean, there it's clearly drawn, in the part
15 of the spec that they're citing as well as all the parts
16 that we cite, that a program can consist of all different
17 types of data. And, in fact, the episodes are
18 represented by the media files which they don't dispute
19 can contain things other than audio. We're not arguing
20 that you don't have to have audio.

21 And the difference between these -- our case
22 and AstraZeneca and some of the other things is nowhere
23 in the specification does it go on to say, "Oh, and in
24 addition to those six that we concentrated on, you could
25 also do this, that, and the other. You could also use

1 this alkaline salt." Instead, there was nothing in the
2 specification that would indicate that you could do
3 anything else. Here the specification is replete with
4 references to adding things to the audio data. And
5 that's the main difference between those cases and this
6 one.

7 THE COURT: All right. Thank you,
8 Mr. Pitcock.

9 MR. PITCOCK: So, on the third one, which is
10 the "downloading" phrases, your Honor --

11 THE COURT: Yes.

12 MR. PITCOCK: -- we essentially don't have
13 anything to address this other than just one sort of
14 nitpicky point because we construed these together and we
15 were trying to narrow the dispute which appeared to be
16 whether the transferred data had to be stored at the
17 local device or not. I just don't want there to be any
18 confusion in the record.

19 I mean, technically the first phrase talks
20 about "downloading a data file." So, it doesn't have to
21 have any antecedent basis like a "the" would normally
22 imply.

23 And then the second phrase talks about
24 "downloading said concentration files"; so, "the" would
25 be appropriate.

1 We just wanted to, you know, for the record
2 note that technically in the first phrase it should be
3 "a" file and then the second phrase should be "the" file.

4 THE COURT: All right. Thank you,
5 Mr. Pitcock.

6 MR. LIEBERMAN: Good morning, your Honor.
7 Steve Lieberman.

8 Unlike the "episodes" term that Mr. Lo
9 addressed, the term "downloading" has and had at the time
10 the patent application was filed a specific meaning, a
11 specific and narrow meaning. "Downloading" at that time
12 was known to be different from "streaming."

13 If I could ask you to go to Slide 19, Brian,
14 in the book we provided to the court.

15 It was well known at the time the patent
16 application was filed that there were two very distinct
17 ways of transferring data, and I'd like to use some
18 commonly known technology at least if you have a -- or
19 have had a teenager in the house, that's a commonly known
20 technology to illustrate the point. And on the one hand
21 you've got an iPod where people can download songs to the
22 iPod and the songs are there permanently, at least until
23 your iPod breaks and then you go in crying to the Apple
24 store trying to get your songs back. The songs are there
25 permanently.

1 So, if, for example, you were on an airplane
2 that was not equipped with Internet service and you had
3 an iPod, you could listen to your songs. They have been
4 downloaded and they're stored permanently, as opposed to
5 media that is streamed. And the example there that is
6 probably best known is Netflix. When people get a movie
7 from Netflix, the movie is streamed to them. It's live.
8 They can watch it. But when they're finished watching
9 it, it's gone. Poof, it's not in their memory; it's not
10 in their device. So, if again you were on this airplane
11 that does not have Internet service and you were trying
12 to watch a streamed movie, you could not do that because
13 the movie -- even if you had watched the movie let's say
14 the day before, if the movie were streamed to your
15 device, it is no longer on the device. So, when you're
16 on the airplane and you say "I'd like to watch this movie
17 again," there's no movie to watch.

18 We provided, with our claim construction
19 brief, a 1997 article from Jonas which makes clear that
20 the distinction between downloaded media and streamed
21 media was well known; and the definition of those two
22 terms from the Jonas article is on Slide 19.

23 There's also a discussion in the *Real Networks*
24 *versus Streambox* case, which was not a patent case, that
25 talked about the difference between streaming and

1 downloading. And the court there explained in contrast
2 the two, "When an audio or video clip is 'streamed' to a
3 consumer, no trace of the clip is left on the consumer's
4 computer. Streaming is to be contrasted with
5 'downloading,' a process by which a complete copy of an
6 audio or video clip is delivered to and stored on a
7 consumer's computer."

8 And I would note that if you're looking for
9 further confirmation as to what this term means or meant
10 at the time, Personal Audio had produced to us in this
11 case -- and we attached as Exhibit 8 to our submission --
12 Exhibit H to our submission -- a dictionary definition of
13 "download." This was a dictionary definition that they
14 produced which reads, quote, to copy or transfer data or
15 programming into the memory of one's computer from
16 another computer, end quote.

17 So, the question is should the construction --
18 the court's construction of "download" make it clear that
19 it does not include streaming. And that is the reason
20 that we proposed the additional language which is not
21 included in the court's tentative claim construction, the
22 language reading, quote, to the requesting client device
23 for nontemporary storage and later use.

24 The "nontemporary storage" is intended to
25 distinguish downloading from streaming. And the reason

1 we didn't say in our construction "downloading," open
2 paren, "which doesn't include streaming" is because you
3 can't define claim terms in that way. As your Honor
4 knows, you can't do it in that explicit negative way.
5 So, we added in language about "nontemporary storage" to
6 make clear that downloading does not include streaming.

7 THE COURT: And "nontemporary" is not
8 negative?

9 MR. LIEBERMAN: What I -- you're absolutely
10 right, your Honor. We could say "permanent storage." I
11 mean, we would be fine with that, which would eliminate
12 the negative.

13 So, let's look again as to what the word
14 "downloading" meant to the patentee; and again I want to
15 stay with the claim language. If we go to Slide 21,
16 during the prosecution history -- and I'm going to be
17 talking about the prosecution history, with the court's
18 indulgence, in a few moments -- the patentee repeatedly
19 distinguished during the prosecution of this patent
20 "downloading" from "streaming." And that's because there
21 were several references, including the Clanton reference
22 and the Gabbe reference, that the examiner said were
23 problematic prior art for them; and they attempted to
24 distinguish and successfully distinguished over the prior
25 art by saying "But those references involved streaming."

1 They did not involve downloading. They did not involve
2 storing." That was the difference.

3 Now, Personal Audio makes an argument that if
4 you adopted our proposed construction, that would render
5 superfluous the "storage" language in the nonasserted
6 independent claims, claims 1, 8, and 23. It's sort of a
7 claim differentiation argument, but they didn't
8 characterize it that way. But I want to address it both
9 the way they phrased it and in the context of claim
10 differentiation. If your Honor were to look at claim 1
11 or claim 8 or claim 23, the three nonasserted independent
12 claims, in each case when the word "storing" is used in
13 those claims, it is used specifically to say where the
14 information is stored; that is, it is stored "in said
15 digital memory." So, Slide 22 has the language from
16 claim 1. Each time the word "storing" is used, the
17 phrase "in said digital memory" follows that.

18 On Slide 23, it's the same thing for claim 13.
19 After the word "storing" is used, the phrase "in said
20 digital memory" occurs.

21 And then on slide -- and then the same thing
22 is true with respect to claim 23, your Honor.

23 That is what the -- what claims 1, 8, and 23
24 are telling you when it uses the word "storage" is it's
25 telling you where this information is stored. That's

1 important because there are a number of locations that
2 the patent specification identifies where data can be
3 stored. So, for example, on Slide 24 we give two
4 examples from the patent specification where information
5 can be stored. One is in "a removable media cartridge,"
6 and the other is in "an optical disc cartridge." But
7 claims 1, 8, and 23 were limited to the storage "in the
8 said digital memory."

9 So, the argument that saying that downloading
10 requires as part of it storage in nontemporary or, if you
11 wish to eliminate the negative, permanent memory does
12 nothing to render superfluous the "storage" language in
13 the other claims which are not being asserted.

14 I'd now like to direct -- I don't know if the
15 court has questions about the claim language. I wanted
16 to move into the specification, if that's --

17 THE COURT: That's fine.

18 MR. LIEBERMAN: -- convenient for the court.

19 So, turning to Slide 25, the specification in
20 this case makes very clear that the invention was
21 "providing a subscriber with the ability to load audio
22 programs into an audio player and then play those audio
23 programs upon request at a later time." There is
24 repeated reference to local -- "the local mass storage
25 unit to enable the user to easily move from program

1 segment to program segment," et cetera. And we have
2 something to play for the court that we learned about
3 yesterday.

4 On Tuesday of this week, your Honor, on
5 April 22nd, a Canadian broadcasting company broadcast an
6 interview with the first named inventor Mr. Logan.
7 Mr. Logan is not only the first named inventor; he has
8 been involved with Personal Audio throughout this entire
9 process. He's a major -- at least his family trust is a
10 major co-owner. And he described exactly what his
11 invention was. He was asked the question in the
12 interview, "What was the original idea that you came up
13 with?" And we have a 1-minute-and-26-second clip we'd
14 like to play from that interview. Then I'm going to show
15 how what Mr. Logan is describing in 1 minute and 26
16 seconds is exactly what the specification shows that the
17 Personal Audio invention -- invention was. If I might
18 play that, your Honor.

19 THE COURT: Is that something that's been
20 disclosed?

21 MR. LIEBERMAN: We just got it yesterday, your
22 Honor. We don't have a transcript. We can provide the
23 URL to the plaintiff. I had my secretary last night type
24 up a transcript of this minute and 26 seconds. I haven't
25 proofed it yet. I can submit it to both parties -- I can

1 submit it to the court and the plaintiff tomorrow.

2 THE COURT: Mr. Pitcock?

3 MR. PITCOCK: I would object to it both as
4 being very late, not clearly relevant. I don't know --
5 he's got several patents. I don't know if he's referring
6 to this one or not. I haven't seen the transcript yet.
7 And I would also say this is extrinsic evidence of sort
8 of the highest order, you know, to take a hearsay
9 statement and a radio interview, a nontechnical thing,
10 and try to introduce it as evidence of claim
11 construction.

12 THE COURT: Well, Mr. Lieberman, I'm going to
13 sustain the objection of the plaintiff to playing it at
14 this time. You can meet and confer with them about it
15 and if you don't get an agreement, you can file a motion
16 to supplement the record and I'll take up the issues on
17 it. But I agree that with them not having any way of
18 knowing the origin of this and the authenticity of it
19 and -- anyway, I don't think it's proper to play it at
20 this time. I understand completely that you just got it
21 and I don't hold it against you that it's being offered
22 at this time, but I will sustain the objection.

23 MR. LIEBERMAN: Okay. I do note, your Honor,
24 this did appear only on Tuesday. It was only published
25 on Tuesday. We will comply with your Honor's

1 instructions.

2 Should the court grant the motion for the
3 supplementation of the record, we would ask the court to
4 look at how Mr. Logan described his own invention and
5 compare it to what we have said the specification says
6 about the invention. They are literally identical.

7 THE COURT: I am pretty sure that you would
8 not want a general practice to be that we hear from the
9 inventor as to what he intended the scope of his
10 invention to be at *Markman* hearings generally, but I will
11 consider your --

12 MR. LIEBERMAN: I understand the point, your
13 Honor; and I understand that inventor testimony is less
14 important in determining what the patent claims mean than
15 the specification. So, let me move directly to the
16 specification.

17 THE COURT: Okay.

18 MR. LIEBERMAN: If we look at Figure 2 in the
19 specification, Slide 27, Figure 2 makes clear exactly
20 what --

21 Let's go back one page, Brian -- sorry -- to
22 Slide 26.

23 The second bullet point on Slide 26 uses
24 the -- quotes the specification using the words "the
25 invention," (reading) in accordance with the invention,

1 it is desirable to download the equivalent of a full
2 session's programming in addition to the current
3 schedules session programs so that, in the event of a
4 temporary communication link or host failure, programming
5 will nonetheless be available.

6 There are a multitude of examples on the pages
7 in here -- all these specification cites were in our
8 brief -- making clear that the purported invention was to
9 allow a user to download onto his device materials so
10 that the user when in his car or some other place could
11 then play back the programs that he or she wished to
12 hear. That required downloading as that term was known
13 at the time, which meant inclusion in nontemporary or
14 permanent storage. It did not mean streaming because if
15 the material was steamed, it would be immediately gone
16 after the streaming. It had to be stored. Otherwise, it
17 could not be used in accordance with the invention. So,
18 if you look at Figure 2, Figure 2 sets out the process.

19 The second box on Figure 2 is downloading
20 programming and catalog updates. The next box down is
21 editing the download; that is, the specification talks
22 about being able to -- let's say the audio programs or
23 the songs that somebody wished to listen to in the order
24 that person wished to listen to them. And then the next
25 box down is playback sessions. You can only play back

1 something that's been downloaded. You can't play back
2 something that's been streamed because after it's been
3 streamed, it's gone. It's not there.

4 The specification also teaches that an
5 important part of the invention was that the request from
6 the user could come at any time. Specific examples given
7 in the patent specification were, for example, the one I
8 just gave about when you were in an automobile. So, if
9 you look at column 7, line 58, it talks about (reading)
10 to facilitate the use of the system in an automobile, the
11 files are downloaded from the host. They may be stored
12 on a replaceable media and then played. They had to be
13 stored, or it wasn't consistent with the described
14 purposes of the invention.

15 Now, there are 97 different places in the
16 specification in which the word "download" is used. That
17 is before we get to the claims. The plaintiff has
18 referred to only two parts of that specification -- and I
19 want to address both of them -- to argue that something
20 in the specification says that what the invention is
21 meant to encompass is something other than downloading
22 when you have nontemporary or permanent storage.

23 The first -- and this is on Slide 30 -- is at
24 column 5, lines 45 to 53 of the patent. And the language
25 that Personal Audio cites is this language "The player

1 103 further includes a conventional high speed data modum
2 for receiving (downloading) the program information from
3 the remote server and for transmitting (uploading)."
4 They argue from that that the specification has defined
5 "downloading" to mean "receiving."

6 If you look closely at the language that
7 immediately follows that sentence in the specification, I
8 believe it's clear that the word "receiving" and on the
9 next line the word "transmitting" simply talks about the
10 direction that data is going; that is, the player
11 receives data from a server in response to the
12 transmission -- I'm sorry -- in response -- and the
13 uploading is the transmission of the program selections.
14 It's talking about the direction. It's not a definition.

15 Now, we know this is true because the
16 receiving is done by -- "for receiving (downloading) the
17 program information from the remote server 101." Just a
18 few lines down the specification talks about (reading)
19 the host server 101 storing and maintaining a plurality
20 of data files including a program data library. So, this
21 portion of the specification again just talks about the
22 definition of the direction the download, the
23 information, is going from the server to the user.

24 The other portion of the specification, your
25 Honor, that Personal Audio cited to, and the only other

1 portion of the specification, was on the bottom of
2 column 14 and the top of column 15; and it has to do with
3 the reference to what happens when a user wishes to
4 download and play at the same time. So, this is
5 column 14, line 63; and it goes over to the next page.

6 And as the specification says, if we start at
7 the beginning of that paragraph, at line 63, (reading)
8 when a communications pathway such as the Internet is
9 available to connect the player. So, a person is in a
10 hotel lobby and Internet is available. And then No. 2,
11 but he needs to download a needed but locally unavailable
12 segment; that is, he wishes to get something and he's got
13 Internet service. What happens? The downloading and the
14 playing may proceed concurrently; that is, he can
15 download and while the information is being downloaded,
16 he can also play.

17 Now, this is again something that I understand
18 teenagers are very familiar with. When you buy a movie
19 from iTunes, for example, you download the movie, you pay
20 your \$15 for the movie, but particularly if it's a high
21 definition movie, it takes awhile to download. There is
22 an option that is then made available to people "would
23 you like to watch this while it is being downloaded"; and
24 if you click "yes," you can watch it. And that's the
25 purpose of the memory buffer. It's to allow you to watch

1 it while it's being downloaded.

2 But the point is these two words are separate,
3 "downloading" and "playing." The downloading and playing
4 both occur at the same time. The buffer helps with the
5 playing; but the downloading, it goes into the permanent
6 storage or the nontemporary storage. So, that's the only
7 other place that Personal Audio cites in the
8 specification in support of their proposed construction.

9 And by the way, I will mention that they
10 didn't make this argument or cite the relevant portion of
11 the specification in the relevant brief. It was only
12 made in the reply brief. And I know that's something
13 that's disfavored in the Federal Circuit. But their
14 argument is substantively incorrect because the phrase is
15 "downloading and playing."

16 So, what sort of expert testimony, if any, is
17 there in this case about what the word "downloading"
18 means? In the prosecution history, your Honor, there was
19 distinction of certain of this -- the streaming prior
20 art. We put in a declaration from Dr. Adam Porter, and
21 the plaintiff deposed Dr. Porter. In the Porter
22 declaration, Dr. Porter explained that when the reference
23 was made -- he explained what "streaming" meant in the
24 context of the prosecution history and that when you
25 streamed something, it did not go into permanent memory;

1 that is, it would be transmitted and then it would be
2 gone after it was watched.

3 Now, when plaintiff deposed Dr. Porter, they
4 asked him a question. They asked him a question about
5 the meaning of "streaming" versus "downloading."
6 Dr. Porter's answer is at page 35 of the slides.

7 MR. PITCOCK: Objection, your Honor. Object.
8 This testimony that Mr. Lieberman is trying to read into
9 the record now was not contained in Mr. Porter's report;
10 and if you look at his deposition, I specifically asked
11 him on page 88, line 22, "Are you planning on offering
12 any opinions on the meaning of the term 'downloading' at
13 the claim construction hearing?"

14 "ANSWER: I haven't been asked to do anything
15 like that.

16 "QUESTION: Have you been asked to give an
17 opinion on the meaning of any of the terms of the
18 patent-in-suit?

19 "ANSWER: I have not.

20 "QUESTION: And you haven't reviewed the
21 specification of the patent-in-suit in order to try to
22 determine what you think the meanings of those terms are;
23 is that fair?

24 "ANSWER: I have not done that. I have not
25 been asked to do that."

1 So, the testimony that Mr. Lieberman is
2 seeking to elicit was solely drawn because this witness
3 put in what appeared to be a disclaimer argument that the
4 ordinary meaning of "downloading" which wouldn't require,
5 you know, storing in memory was somehow disclaimed during
6 the prosecution history. He never gave a report and he's
7 never given an opinion nor has he looked at any of the
8 relevant materials in order to offer his opinion on the
9 construction of this term and I object to it being
10 offered.

11 THE COURT: Mr. Pitcock, explain to me how
12 this excerpt is different from the previous slide in
13 terms of what Dr. Porter is saying. I --

14 MR. PITCOCK: Because what he is trying to
15 introduce, your Honor, is Dr. Porter's throwaway
16 testimony at his deposition on the ordinary meaning of
17 "downloading" because they didn't elicit that in his
18 report. In his report all he says is "I believe there
19 was a disclaimer of the meaning of 'downloading' that
20 occurred in the prosecution history because it was
21 distinguished from 'streaming.'" Now, obviously we don't
22 agree with that argument. You know, what was being
23 distinguished from "streaming" was storing the data on a
24 digital memory. But he never offers an opinion in his
25 report, never gives the basis for an opinion in his

1 report on what one of ordinary skill in the art would
2 have thought was the ordinary meaning of "downloading" at
3 the time this patent was filed.

4 THE COURT: All right. I'm going to overrule
5 the objection; but I will state that I am not going to
6 consider this testimony as expanding on the opinions
7 expressed in his report, that I'm going to limit the
8 effect of his testimony to the opinions he expressed in
9 his report. And if this is simply an explanation of
10 those opinions, then it will be considered as such.

11 MR. LIEBERMAN: We believe it is, your Honor.

12 THE COURT: All right. Go ahead.

13 MR. LIEBERMAN: We will note that there was --
14 although plaintiff had Dr. Porter's declaration for many
15 weeks before their claim construction brief was due, they
16 did not provide any expert testimony on this issue. So,
17 Dr. Porter's testimony is unrebutted by any expert. It's
18 also completely consistent with the file history, the
19 specification, the Jonas article, and the opinion that we
20 cited to your Honor discussing the difference between
21 "streaming" and "downloading."

22 Turning to the prosecution history on
23 Slide 36. And we're not making a disclaimer argument.
24 The argument that we're making is that the prosecution
25 history buttresses the plain meaning -- the explanation

1 as to what the plain meaning of the word "downloading"
2 is. That is, we're not saying that plaintiff is giving
3 up some portion of what the ordinary meaning of the word
4 "downloading" is through the prosecution history
5 although, you know, if the court were to say that
6 "downloading" really did have such a broad meaning as the
7 plain and ordinary meaning -- and I don't believe there's
8 any evidence to support that; but if the court were to
9 believe that to be the case, I think this would be a
10 disclaimer. But our view is that all of the evidence is
11 that downloading is different from streaming and it has
12 that component of storage in nontemporary memory. And
13 this is confirmed by seven different instances in the
14 prosecution history where the patentee specifically
15 distinguished its invention, the downloading, from the
16 prior art references on the basis that they involved
17 streaming.

18 Now, Personal Audio -- not only did Personal
19 Audio do this seven times in three different submissions
20 to the patent office, three times -- and this is on
21 Slide 38 -- they told the examiner that claim 31 was
22 allowable over the prior art showing streaming, quote,
23 for the same reasons advanced with respect to claims 1
24 and 8. They said the exact same reasons apply with
25 respect to those other claims as apply with respect to

1 claim 31. They said it three times, and the three
2 statements are on Slide 38 that we provided to your
3 Honor.

4 The response from Personal Audio was this
5 (reading) is boilerplate language designed to move the
6 prosecution case forward and it should be disregarded. I
7 think your Honor is certainly more familiar than I with
8 the consequences of making statements during patent
9 prosecution; and we would ask the court to hold Personal
10 Audio to what it said about the meaning of "downloading"
11 which is, we believe, exactly what they were doing.

12 If your Honor has questions, I'd be happy to
13 answer them.

14 THE COURT: No. I appreciate that. I'd like
15 to hear the response from the plaintiff.

16 MR. LIEBERMAN: Thank you, your Honor.

17 THE COURT: Thank you, Mr. Lieberman.

18 MR. PITCOCK: So, just in response, it should
19 be noted that we introduced the testimony of a
20 third-party prior art witness that was actually
21 subpoenaed by the defendants, who testified that
22 streaming was downloading, that that was the meaning to
23 one of skill in the art at the time and now. It's a term
24 that if you look at this portion of the specification
25 which Mr. Lieberman glosses over and tries to argue that

1 for some reason we're not allowed to cite different parts
2 of the patent specification in rebuttal to his argument
3 that the specification always teaches, you know,
4 permanent storing of data, this is a place where it talks
5 about a memory buffer, which is temporary storage, and it
6 refers to it as "downloaded information." So, it's
7 specifically using the term "downloaded" to mean
8 "transferred" as the patentee does in other places in the
9 specification which Mr. Lieberman cites.

10 And I guess just one other point. I mean, he
11 tries to draw a distinction between -- and he does it for
12 the first time here today. I don't think it was in any
13 of his briefing but he tries to distinguish, you know,
14 optical cartridges and other things from digital memory
15 and all of those would be digital memory. I mean, that's
16 not -- that's not a distinction. That doesn't get you
17 around the claims differentiation problem.

18 Again, this is where the patentee explicitly
19 defines "downloading" as "receiving data." It says
20 nothing about storing it.

21 And the prosecution history actually doesn't
22 support their argument. Their argument is that we use
23 downloading -- we argue that the term "downloading" meant
24 "storing." But we actually didn't. All seven of those
25 times that are in the prosecution history we are

1 distinguishing "storage" from "streaming." We are not
2 distinguishing "downloading" from "streaming." And, in
3 fact, there would be no reason to make these arguments
4 about storage which only appears in claim 1 -- there
5 would be no reason to make those arguments about storage
6 if "downloading" meant you had to store it at the local
7 device anyway. There would be no -- this argument would
8 make no sense if "downloading" meant you had to store it
9 anyway. And nowhere is "downloading" distinguished --
10 so, every single time it is not "downloading" that is
11 being distinguished from -- that's not the term that's
12 being distinguished. It's "stored."

13 You know, Clanton and these prior art
14 references don't teach storing in the memory; they don't
15 teach storing. Gabbe does not store.

16 (Reading) Clanton's set box streams media from
17 the server and does not store.

18 (Reading) Gabbe's table of contents is
19 streamed to the workstation but not stored.

20 That storage argument is just not present with
21 respect to claim 31. And if you look at the prosecution
22 history, which their -- their expert did not, you'll
23 realize that that's just not a limitation in claim 31.
24 We know where it requires storage of the downloaded
25 information, at a client device, which makes perfect

1 sense since this is a server side apparatus claim. You
2 know, trying to dictate what would happen at the local
3 device would make no sense.

4 THE COURT: All right. Thank you,
5 Mr. Pitcock.

6 MR. LIEBERMAN: Just very briefly, your Honor.
7 The argument regarding the other places referred to in
8 the specification where data can be stored is in our
9 claim construction brief at pages 15 and 16; and we would
10 simply refer your Honor, with respect to the prosecution
11 history, to those three amendments. We think the
12 amendments are very -- the three patent office responses
13 are very clear on their face. The responses are
14 distinguishing the streaming prior art from the claimed
15 invention which involves downloading and downloading
16 requires storage.

17 And again with respect to the buffer argument,
18 column 14, the language of the specification is
19 "downloading and playing." The buffer is used for the
20 playing. That's what buffers are used for. It's not --
21 it has nothing to do with the downloading itself. The
22 downloading requires storage in nontemporary or permanent
23 memory.

24 THE COURT: All right. Thank you.

25 MR. LIEBERMAN: Thank you, your Honor.

1 THE COURT: I understand the arguments.

2 MR. PITCOCK: Subject to any argument by the
3 defendants, we agree with the construction of "URL" and
4 believe that "storage location" has a plain and ordinary
5 meaning and don't have anything to add other than that
6 would appear to be the ordinary meaning of those terms to
7 one of skill in the art as we set forth in the brief and
8 as admitted by the defendants' expert at his deposition.

9 THE COURT: All right. Thank you,
10 Mr. Pitcock.

11 MR. LO: Your Honor, Jason Lo on behalf of
12 defendants.

13 We start this discussion with something that I
14 think we agree on both sides of the podium which is that
15 the term "URL" is short for "universal resource locator."
16 Just three words. And in those three words alone I think
17 a layperson would understand that there's something
18 standardized or universal about this locator, that it's
19 supposed to help you locate something, and that
20 "something" is some kind of a resource. So, everybody
21 agrees what "URL" stands for and that it's got some vague
22 meaning even to laypersons not familiar with the
23 intricacies of the Internet; and, yet, both sides cited
24 construction of this term.

25 We've not really heard Personal Audio

1 articulate what it is that they sought to clarify from
2 the term "universal resource locator." From the
3 defendants' perspective, we have a pretty modest
4 proposal. We think that if we're going to construe this
5 term "URL," we ought to try to at least answer two basic
6 questions. No. 1, what is the resource that you are
7 attempting to locate; and, No. 2, what is the address or
8 what is it that is supposed to help you locate that
9 particular resource? Any construction, if we're going to
10 try to expand and explain what the term "URL" means,
11 should try to answer one or both of those questions.

12 With respect to the first question, in other
13 words, what is the resource that is being sought to
14 locate it, we don't have a problem with the court's
15 construction from the abstract. Obviously "URL" stands
16 for "universal resource locator," and it's supposed to
17 help you locate some kind of resource. But I think we
18 can help define that a little bit more clearly, and I
19 don't think this part is in dispute.

20 In the claim language in which "URL" is being
21 used, it's not just any resource. I don't dispute that
22 in other context that URL can be used to locate other
23 types of resources; but when we're talking about this
24 patent and these claims, the only types of resource that
25 are being sought to be located are files. They're data

1 files, they're media files, they're compilation files --
2 media files, compilation files and media files.

3 We've listed in Slide 45 -- this is just all
4 taken from claim 31 -- the only instances in which "URL"
5 is used in claim 31, and I think it's consistent with the
6 only usage of the term "URL" in the specification. So,
7 one modification we have proposed for the court's
8 proposed construction is to replace the word "resource"
9 with "file."

10 THE COURT: Mr. Lo, since the claim language
11 itself in every place where the term "URL" is used
12 specifies what the resource is and it's different each
13 place it's used, why should we attempt to include that in
14 the definition of "URL"?

15 MR. LO: Because that is precisely the dispute
16 between the parties is -- as I understood Personal
17 Audio's position in the papers -- I know it's not
18 explicit -- I don't think they necessarily agree that a
19 URL only has to refer to a file. That is the
20 disagreement. We believe that the claims make clear that
21 anytime when you're using URL it's used to identify a
22 file. We don't purport to inject into our construction
23 the particular type of file. So, all we're saying is
24 it's got to be a generic file and then we'll leave it to
25 the claim limitations to say whether it's a data file, a

1 media file, or a compilation file, but it should be a
2 file and --

3 THE COURT: Well, tell me what your fear is
4 that they will argue a URL applies to if not the language
5 set out in the claim itself.

6 MR. LO: Sure. And that comes from their very
7 proposed construction itself. Their proposed
8 construction.

9 Would you go back to just 44, Brian?

10 Their proposed construction says "resource"
11 and in parentheses "as a document or website." So, one
12 thing that I think they're trying to put in is "website"
13 or "document" and I don't know if that's the same thing
14 as a file or whether that's what they intended, but
15 they're clearly deviating away from the claim language in
16 their proposed construction. And I don't know the reason
17 for it, but I can only suspect that there is a
18 infringement or invalidity rationale for deviating from
19 the claim language.

20 THE COURT: All right. Well, I'll address
21 that with them in a moment.

22 MR. LO: Okay. So, that's the first question
23 which is "what kind of resource are you trying to
24 locate"; and we think that the claim language is very
25 clear. It says "file." And we have different types of

1 files, which I don't dispute what your Honor is saying;
2 and we don't purport to try to define what particular
3 type of file it is.

4 Then the second question that we think ought
5 to be answered if we're going to try to improve upon
6 "URL" is how are we going to locate that particular
7 resource, what does the address look like? And again we
8 are not trying to be exclusive in our definition, but we
9 are saying -- and I don't think there's any disagreement
10 in the patent specification or in the extrinsic evidence
11 shown by Personal Audio -- that all files have some kind
12 of a file name and a path associated with it. If you're
13 going to store it, whether it's on the court's computer
14 system, it's on my computer, it's on the Amazon or the
15 IBM website, every file in the world that is stored has
16 some of kind of a file name and a path associated with
17 it; and the address should include at least those two
18 basic things that are required to locate a file. It may
19 have other things. You could have, for example, in
20 addition to that, the size of the file, the date of the
21 file, and things like that but we're not trying to be
22 exclusive about how you can locate it, but we're just
23 saying that as a baseline indicator, if we're going to
24 tell the jury and explain to the jury what a URL is, we
25 ought to just tell them here's the type of resource that

1 are at issue and here are the basic types -- minimal
2 types of information that one needs in order to locate a
3 particular specific file.

4 THE COURT: Okay. Tell me again what your
5 concern is that the jury might conclude if we don't tell
6 them how URLs work.

7 MR. LO: Sure. And that comes up also in
8 their construction. So, for example, one thing that they
9 said was you could have a web page as a URL and if we
10 looked at, for example, the court's website, we'll see
11 that, you know, there are numerous pages and within them
12 you may have files that are accessible -- a standing
13 order of some kind, the court's calendar or another --
14 and if you are simply saying that a website to -- a
15 website location -- for example, just to the
16 ed.texas.uscourts.com website -- that doesn't really tell
17 me where a particular file is. What you need to do is to
18 be more specific.

19 So, what we are trying to do is drill down so
20 that we prevent an instance where what they are claiming
21 is something that is very top level, very vague and
22 saying that, well, somewhere if you then navigate through
23 those pages, you'll be able to find a particular file.
24 That's not what the claims are saying. That's not what
25 URL is meant to be. A URL is supposed to be a specific

1 address for a specific, in this instance, file; and, so,
2 you have to tell us where we can find that specific file.

3 THE COURT: All right. I understand your
4 argument.

5 MR. LO: Thank you.

6 MR. PITCOCK: So, just to address this, I
7 mean, as specifically as I can, a URL can be an address
8 for a file without specifying within the language of the
9 URL the file name or the path name. This was known to
10 their expert. He admitted it at his deposition. It's in
11 their -- this is an excerpt from one of the prior art
12 books that they have provided to us; and it specifically
13 says, as is well known, that "Sometimes the URL won't
14 have a filename at the end" and "That's not necessarily a
15 mistake" because if you're going to a document on a
16 website, you can use a URL without specifying the file
17 name. There's still a file. It's still an html -- for
18 example, the court's website, it's some markup language
19 text document that's being copied and transferred to the
20 local server -- or the local computer from a server but
21 it is still copying a file and that URL specifies the
22 file that's going to be sent without using a file or path
23 name.

24 THE COURT: Okay. And what about the issue of
25 whether it is, under these claim terms, limited to items

1 other than files?

2 MR. PITCOCK: Well, I think it's pretty clear
3 from the -- I mean, "URL" doesn't mean "file" or you
4 wouldn't have to specify in the claim that it was to a
5 file. I don't understand why there would be any
6 confusion about the URL or what it has to point to just
7 because it refers to a file.

8 THE COURT: Well --

9 MR. PITCOCK: I mean, what they seem to be
10 incorporating is this notion that if you've got a URL for
11 a file, it has to have a file name or path name; but it
12 doesn't. You can have a URL that doesn't specify a file
13 name or a path name.

14 THE COURT: In this claim, claim 31, are there
15 places where you believe "URL" is used not referring to a
16 file but to something else?

17 MR. PITCOCK: Well, I don't think the term in
18 general refers to a file; but every time that the
19 claim -- I would admit that every time claim 31 talks
20 about a URL, I believe it's in reference to some kind of
21 file.

22 THE COURT: Okay. So, it's -- you don't have
23 any intention of arguing that as used in claim 31 it
24 is -- that the resource that's at issue is something
25 other than a file.

1 MR. PITCOCK: I would agree with that, your
2 Honor.

3 THE COURT: Okay. All right. Let me just
4 hear back from Mr. Lo on this question of where in the
5 record we have something that would require a path name
6 for a specific file with each URL.

7 MR. LO: Sure, your Honor. And preliminarily
8 I think I can answer your Honor's question with reference
9 to this slide that is up on the page right now. And this
10 is precisely the issue I was concerned about in terms of
11 not saying that you have to have a file or path name in
12 order to identify the location of a specific document.
13 In this statement it says (reading) some URLs, when
14 you're not trying to locate a particular file or
15 document, may not have a file name at the end. And in
16 this case it just says <http://ziff.com>. And the next
17 sentence makes that very clear. "This specifies the
18 host, but no directory or document." In other words,
19 it's not telling you where a directory or document is
20 located. It's simply telling you that that is the place
21 where it is hosted. And, so, that is exactly why we
22 think it's important to make clear, if we're going to
23 improve upon the ordinary meaning of "URL," to say what
24 kind of file it is and to give some kind of indicia in
25 terms of where it can be located.

1 Now, in terms of your Honor's question about
2 where in the record we can have some indication that
3 there has to be a path or file name, I think the only
4 place that "URL" comes up in the specification is
5 column 18, line 55; and I think Mr. Acosta will talk a
6 little bit more about this a little bit later as well.

7 But basically what they are defining in the
8 specification is that the URL field "specifies the
9 location of the file containing the program segment in
10 the file storage facility indicated at 304" and then it
11 goes on in parentheses to say (reading) for example, it's
12 located on an FTP server 125 in Figure 1 but other
13 storage areas that may be accessible location on the
14 Internet. So, with the example of the FTP server and
15 with the specific reference of specifying the location of
16 the file, we don't think that there's any dispute that
17 every file location can be described by at least the file
18 name and the path location.

19 Again, as I said earlier, your Honor, it is
20 not our intention to say that if you go beyond that and
21 have additional description, that that somehow takes you
22 outside the realm of URL. All we are trying to do is
23 define the minimum requirements necessary to locate the
24 file.

25 THE COURT: Doesn't claim 31 itself tell you

1 what the URL has to identify?

2 MR. LO: It does, and it doesn't. It says
3 that you need to identify a specific file for download,
4 but I think what is in dispute here is what is an address
5 and what constitutes an address in the -- or locator, to
6 use the URL terminology. And that's what the parties are
7 trying to improve upon in terms of the vague language of
8 just saying "universal resource locator." In other
9 words, what does one need to locate a particular file on
10 the Internet for, as claim 31 says, downloading a
11 particular file.

12 THE COURT: All right.

13 MR. LO: Thank you, your Honor.

14 THE COURT: Thank you, Mr. Lo.

15 MR. PITCOCK: You may have heard enough on --
16 I'm sorry, your Honor.

17 THE COURT: Go ahead.

18 MR. PITCOCK: You may have heard enough on
19 "URL," but I just wanted to point out one thing about
20 this part of the specification. Here, although it gives
21 an example of a preferred embodiment using a field to
22 specify the location, it goes on to say that you can
23 store it on web server -- so, that would be a file on a
24 web server, presumably including a website -- or at any
25 other accessible location on the Internet. And

1 they've -- there's nothing that indicates that you have
2 to have a file name or a path name for a URL for a file
3 at any accessible location on the Internet. It's just
4 not true. In fact, documents -- you know, text
5 documents -- when you go to a website in your browser, a
6 text document, a file, you're specifying what file is
7 being sent to your browser to be rendered on your
8 computer. And all of this to some degree is a little
9 irrelevant anyway because the only question we're here to
10 answer is what does "URL" mean to one of ordinary skill
11 in the art, you know, in the context of this patent; and
12 there's nothing that indicates that it would have to have
13 a file or a path name.

14 THE COURT: All right. Thank you,
15 Mr. Pitcock.

16 Do you want to address "storage location"?

17 MR. PITCOCK: Yes, your Honor.

18 Well -- I apologize. I'll just leave this up
19 and briefly note that, you know, again this is nothing
20 more than an attempt to read a preferred embodiment into
21 broader claim language. There's a preferred embodiment
22 that talks about having program segments in a storage
23 facility but then this same part of the specification,
24 which was the only part that I believe they cite to, goes
25 on to say you can store it anywhere, presumably not at a

1 storage facility, and that the ordinary meaning of the
2 term would mean any place where, you know, you could
3 locate data.

4 THE COURT: All right.

5 MR. ACOSTA: Good morning, your Honor, Matt
6 Acosta for defendants.

7 First of all, I'd like to spend a little bit,
8 if you will, defining the dispute here. I think it's
9 important and I think while this dispute is related to
10 this dispute you just heard concerning "URL," I think
11 there's a specific distinction but at the same time I
12 think because "URL" and "storage location" appear
13 together in the same claim limitations in claim 31, I
14 think looking at the disputes together and also what
15 might be argued later to a jury will actually give the
16 court some indication of why these claims need to be
17 construed, and specifically "storage location," other
18 than just the plain and ordinary meaning.

19 So, I -- first of all, I'd like to point out
20 this -- plaintiff's slide is up here -- we take dispute
21 with the interpretation just generally of this portion of
22 the specification and really I'll explain in a second
23 that it's the only part of the specification that really
24 gives any color to both "URL" and the idea of a "storage
25 location" and I really don't think that there's a dispute

1 of that -- that this is the portion of the specification
2 we're looking at between the plaintiff and defendants.
3 Both of our briefing point to this particular portion.

4 But if you'll notice, it says, "The
5 Program_Segment record's URL field specifies the location
6 of the file containing the program segment in the file
7 storage facility indicated at 304 in Figure 4." And I
8 will show that to the court in a second. But then in
9 parentheses it doesn't say "other than the storage
10 facility" -- there could be other things other than a
11 storage facility where the URL points to. It doesn't say
12 that at all. It says, (reading) for example -- so, we're
13 talking about a storage facility -- (reading) for
14 example, that storage facility could include an FTP
15 server, it could include a web server, or -- and I'd like
16 to direct the court -- any other accessible location on
17 the Internet. It must be accessible. And I think those
18 words were skipped over and also I think the idea that
19 these are alternatives to a storage facility rather than
20 examples of a storage facility and we take issue with
21 that interpretation of that language. So, with that,
22 we'll move to our slides; and I'd like to make it clear
23 for the court.

24 I think we're on 51.

25 MR. LO: That was ours.

1 MR. ACOSTA: That was ours. Okay.

2 We'd first like to make clear that the
3 disputes here -- and defendants are not arguing and have
4 never argued that "storage location" needs to be a
5 physical location, it needs to be a particular storage
6 facility, such as it must be an FTP server, it must be a
7 file server. We're not arguing that. We think that the
8 language that you just saw in the claim is clear that it
9 could be an FTP server, it could be a file server, it
10 could be any other accessible location on the Internet.
11 So, that's not what we're arguing.

12 What we're primarily arguing is that because
13 of its location in the claims and because of the way that
14 the specification reads -- and that language that you saw
15 in the specification reads, you have to define for the
16 jury that what we're talking about is a location in --
17 and "in" is important -- a storage facility, not just the
18 storage facility itself. Because, for instance, "storage
19 location" taken alone -- if we were to bring more and
20 more boxes into this courtroom, you could interpret this
21 courtroom as being a storage facility and obviously
22 that's an extreme example, but you take that to the way
23 the modern Internet works and what we'll be arguing in
24 this case later on -- and I have an example later on to
25 show why that is relevant and what the possibilities

1 would be.

2 Let's go on to the next slide here.

3 So, the term "storage facility" only occurs in
4 three places in claim 31 in the entire patent.

5 THE COURT: The term "storage location"?

6 MR. ACOSTA: Excuse me. "Storage location"
7 only occurs in three locations in the entire patent, and
8 these are the three locations. The first one being
9 "stored at a storage location specified by a unique
10 episode URL," the second being "storage servers at a
11 storage location identified by a predetermined URL," and
12 the third being "URLs specifying the storage locations."
13 So, as the court can see, URLs and storage locations are
14 interrelated in the patent. But I'd also like to point
15 out that a storage location has to do a couple of things
16 based on just this claim language. It must store media
17 files and compilation files, and it also must be
18 identifiable by URL.

19 Moving on, we see that language provides a
20 little color and is the only place in the specification
21 that really talks about URLs pointing to the place where
22 files are stored and we see that instead of the word --
23 instead of the phrase "storage location," the patentee
24 used the word "file storage facility" and specifically
25 that the URL points to a location "in the file storage

1 facility indicated at 304."

2 So, looking at Figure 4 at 304, you see an
3 arrow pointing to a box; and in that box is examples.
4 Once again, our interpretation of that sentence, examples
5 are FTP servers, web server, or accessible locations on
6 the Internet. You see in the box in Figure 4 it says
7 "FTP," et cetera, and then you go to Figure 1 and it has
8 more boxes indicating "FTP server" and web server as the
9 identifiable examples elsewhere in the patent that could
10 constitute a storage facility.

11 Now, this might seem academic; but it's
12 actually fairly important because if we continue with
13 plain and ordinary meaning as the definition of "storage
14 location," that provides license to essentially take the
15 limitation out of the claims entirely. Now, this
16 really -- for the first and third examples where "storage
17 location" appears in claim 31, this might not seem like
18 it's a huge deal specifically because you say (reading)
19 each one of said media files specified by a unique
20 episode URL and in the third example it would read URLs
21 specifying one or more corresponding media files. So,
22 you still have URLs pointing to something.

23 So, why do we need to provide color for
24 "storage locations"? This isn't about -- this dispute
25 isn't about preferred embodiments; it's not about

1 specific physical facilities or facilities on the
2 Internet. We're talking about URLs that need to point to
3 a location in something. And what the specification
4 defines that "in something" to be is in a storage
5 facility.

6 So, let's move to the example. Here's why we
7 need a definition of "storage location." You go to
8 www.uspto.gov. That is a URL that points to a set of
9 servers that hosts all of the facilities necessary to
10 serve up a web page for the domain. So, you go --
11 physically you have a bunch of servers, they receive a
12 request, they build a web page, and they send it to you
13 over the Internet.

14 Now, if we pretend that also on that domain is
15 a folder called "compilationfiles" and then a specific
16 document called "updatedversion.htm" and the reason --
17 and this is entirely fabricated, but the reason I came up
18 with that is -- with that particular URL is because what
19 we're talking about in the second example in claim 31 is
20 storing an updated version of a compilation file in one
21 or more data storage servers at a storage location
22 identified by a predetermined URL.

23 So, if we take defendants' construction to
24 uspto.gov/compilationfiles/updatedversion, you'll see it
25 points to an html file called "updated version" within a

1 folder called "compilation files" on servers hosting
2 www.uspto.gov. This is a location in a storage facility
3 and the meaning of this particular part of claim 31 is
4 bolstered by defendants' construction and it is
5 consistent with what the specification is talking about.

6 Now, if we continue with plain and ordinary
7 meaning, then "storage location" can be defined as any
8 particular level of the Internet. It doesn't have to be
9 in a storage facility. It can be the storage -- for
10 instance, the storage facility itself. And this might be
11 abstract; but the example here is pretend that the URL
12 uspto.gov/compilationfiles/updatedversion.htm simply
13 doesn't exist. You cannot access that on the Internet.
14 However, updatedversion.htm is stored somewhere on those
15 servers. There's no way to get to it. It's just stored
16 somewhere. You can't access it. If you're a person
17 looking on the Internet, there's no link to it, there's
18 no URL to it.

19 However, if you knew that fact, if you knew
20 that it was stored on those servers, even though you
21 couldn't get to it, you could argue, based on plain and
22 ordinary meaning, that you're storing an updated version
23 of a compilation file, because it's stored on the
24 servers, on one or more data storage servers, because
25 once again it's stored on the servers, and it's

1 identified by a predetermined URL. Well, you ask the
2 question: There is no URL. You can't get to it. What
3 is the storage location? Well, under plain and ordinary
4 meaning you could argue that it's just generally
5 uspto.gov even though there's no way to get to that file.

6 Now, this is just one of several examples --
7 and this is probably the most basic example -- why this
8 particular definition matters. There are other ways that
9 the 2014 Internet works that would call to question this
10 particular term. And the reason we want it defined is so
11 that it stays in line with both the reading in the
12 specification, what the invention claims, and also what
13 the claim language seems to indicate.

14 And I'll stop there if the court has any
15 questions.

16 THE COURT: Basically as I'm following your
17 argument, you're saying that because there is a place in
18 the specification where it refers to this storage
19 location as being in a storage facility, that that is the
20 definition that we have to give to "storage location."

21 MR. ACOSTA: Yes and no, your Honor. I'm not
22 saying that "storage location" means "storage facility"
23 and that the terms are interchangeable. I believe that
24 "storage location" specifies that it needs to be a
25 location in a storage facility.

1 THE COURT: And there's -- the only place in
2 the specification where that's mentioned is the place
3 where you -- that you put up on the screen before.

4 MR. ACOSTA: Yes, your Honor. That's the only
5 place that talks about URLs pointing to a location with
6 files in them, which is what I pointed the court earlier,
7 the essentially work that "storage location" needs to do
8 in the claims and that's why it's there. So -- and I
9 don't think there's any dispute between plaintiffs and
10 defendants that that is the relevant part of the
11 specification. It's in both of our briefs and both of --
12 and both plaintiff and defendants argue that portion of
13 the specification to make their respective points.

14 THE COURT: All right. I guess I am really
15 having trouble following how it's going to help the jury
16 understand "storage location" to specify that it's a
17 location in a storage facility. I'm also having trouble
18 seeing how the -- this -- use of this term in the
19 preferred embodiment should require the construction that
20 you're putting forth, but I --

21 MR. ACOSTA: And if I may clarify just a
22 little bit more, the reason it should is because there is
23 a level of abstraction to the words "storage location"
24 because they are so generic. And in our brief we gave an
25 extreme example I believe, and I mentioned it earlier.

1 But a storage location could be essentially anything and
2 because a storage location could be essentially anything,
3 it is not translatable directly in its plain and ordinary
4 meaning to what these claims are talking about and it can
5 be abstracted to any level of abstraction regardless of
6 whether it is in the specification, is part of the
7 invention, or it's what's contemplated in the claims.

8 THE COURT: But the claim language itself says
9 where this storage location is to be, doesn't it? I
10 mean, it -- every time "storage location" is mentioned,
11 it goes on to describe the storage location that's at
12 issue, specified by a URL or identified in some other
13 way, doesn't it?

14 MR. ACOSTA: And that's exactly why I had this
15 particular example, because in here -- in this example,
16 in this claim language up at the top of this slide, it
17 says what this claim requires is an updated version of a
18 compilation file and in storage servers, in storage
19 servers -- identified by a predetermined URL. So, if you
20 get rid of that claim language, then the storage servers
21 can be identified by any URL. As long as they identify
22 the servers generally -- once again a level of
23 abstraction. So, the file is in those servers over there
24 somewhere. We don't know exactly where it is.

25 THE COURT: How does adding "in a storage

1 facility" change that?

2 MR. ACOSTA: Because then you have "one or
3 more data storage servers in a storage facility
4 identified by a predetermined URL." So, the storage
5 facility that the compilation file is in must be
6 determined by a predetermined -- must be specified by a
7 predetermined URL. And once again, the URL is modifying
8 "storage location"; and we are simply clarifying that the
9 URL -- that the modification means you need to point
10 somewhere in a storage facility, not just generally at
11 the storage facility. Your Honor, it's like saying
12 "Where are those particular cups in the warehouse" and
13 your answer is "They're in the warehouse" instead of "Oh,
14 they're on this particular shelf."

15 THE COURT: Okay.

16 MR. ACOSTA: And that's what we're afraid is
17 going to happen.

18 THE COURT: I just don't understand how adding
19 "in a storage facility" gets you to the shelf.

20 MR. ACOSTA: Because in -- with that
21 construction, it makes particularly clear when you plug
22 it into the claim language that the URL is pointing in --
23 it must point in a storage facility and not, at the
24 greatest level of abstraction, any storage location.

25 THE COURT: Okay.

1 MR. ACOSTA: Thank you.

2 THE COURT: Thank you, Mr. Acosta.

3 Mr. Pitcock, if you want to respond. We're
4 going to take a short recess at the end of this term
5 before we move on with the rest.

6 MR. PITCOCK: I guess my only comment to all
7 this is that almost none of this -- even the argument --
8 is contained in their briefing; so, I'm kind of
9 responding to it for the first time now. But there's --
10 he doesn't even define what a "facility" is. I don't
11 know how adding that to the construction of the term
12 "storage location," which would seem to have an ordinary
13 meaning to one of skill in the art, you know, even helps
14 them given the statements that he's made about the
15 breadth of the term "facility." So, I guess that's my
16 only comment.

17 THE COURT: Okay. All right. We'll take a
18 ten-minute recess at this time. Thank you.

19 (Recess, 10:38 a.m. to 10:55 a.m.)

20 THE COURT: Let's see. I believe,
21 Mr. Pitcock, the next term is "compilation file."

22 MR. PITCOCK: Yes, your Honor; and I neglected
23 to do something earlier which I apologize for. We
24 prepared a binder I'm sure pretty similar to the
25 defendants' binder which has copies of the briefing, the

1 deposition of Dr. Porter, et cetera; and I'd like to
2 offer it at this time so that the court has copies of it.

3 THE COURT: All right. As long as you make it
4 available to the defendants as well.

5 MS. DAVIS: We have a copy, your Honor.

6 THE COURT: Okay.

7 MR. PITCOCK: Do you mind if Mr. Chaudhari
8 approaches?

9 THE COURT: All right.

10 MR. PITCOCK: I'd just note earlier I read
11 from the Porter deposition transcript; and that is
12 contained at Tab 9 of the second binder I handed up, your
13 Honor, just for reference.

14 THE COURT: All right. Thank you.

15 MR. PITCOCK: So, I think it makes sense to
16 address actually the next two terms, "compilation file"
17 as well as the phrase in which that term is used in the
18 claim. And that's part of our argument is that the claim
19 requires -- it's an apparatus claim, and part of the
20 apparatus is a processor which performs certain
21 functions. And there's a listing here; and one of the
22 things it does is "from time to time, as new episodes
23 represented in said series of episodes become available,
24 storing an updated version of a compilation file" -- and
25 you've said this has a plain and ordinary meaning, and

1 from that I infer that you do not believe that the
2 compilation file needs to be assembled -- or the updated
3 version of "compilation file" needs to be assembled by
4 the processor. And, you know, our argument is relatively
5 straightforward.

6 "Compilation file" is not a term that has an
7 ordinary meaning. It's not a term like "URL" or "storage
8 location" that one of skill in the art would know what it
9 meant without looking to the patent to see how it was
10 described. And the Federal Circuit has held, in cases we
11 cited in our brief, that when it comes to claim terms
12 that don't have an ordinary meaning, it is proper to look
13 to the specification to try to determine what it is that
14 these terms mean. And if you look at the specification,
15 it is very clear that the server which would contain the
16 processor is compiling the files for downloading. So,
17 the compilation file is a file that is compiled or
18 assembled by a processor.

19 And if you look at the joint claim
20 construction statement, which is also at Tab 3, there is
21 a definition of "compilation" as "the action or process
22 of producing something, especially a list, book, or
23 report, by assembling information collected from other
24 sources." And we would say that, you know, again in the
25 specification it talks about the compilation being

1 written to the download directory by a processing
2 mechanism and that with reference to the specification as
3 well as the normal meaning of "compilation," the claim is
4 specifying that it is the processor that is performing
5 the assembly of this file, that it's a compilation file
6 because it is being assembled by the processor.

7 And the final point is -- you know, this was
8 obviously critical to the allowance of the invention.
9 The examiner specifically doesn't, you know, cite to
10 where the data is stored at the local device or anything
11 of that nature in his reasons for allowance but, rather,
12 that it doesn't suggest updating and downloading a
13 current version of a compilation file and it contains all
14 the information that's in the claim, but the very nature
15 of a compilation file is it is a file that is being
16 assembled by the processor, as described in the patent
17 specification.

18 THE COURT: Now, Mr. Pitcock, we -- I try and
19 take a consistent approach to claim construction, and I
20 take seriously the Federal Circuit's command to start
21 first and focus on the claim language. I try to do that
22 whether it's the plaintiff seeking to add limitations to
23 it or the defendant, and I -- it seems to me here that
24 what you're proposing is for us to add something that the
25 language didn't but could have added to the claim. And

1 I'm -- I am I guess looking for some way to distinguish
2 this from every other request to read into the claim
3 language whatever might appear elsewhere in the
4 specification.

5 MR. PITCOCK: Well, I think the way in which
6 it's done -- so, for example, all of the parties agree
7 that media files have to include audio data because of
8 the way the specification describes the invention. And,
9 you know, that would be even overcoming the ordinary
10 meaning of that term which might be broader.

11 If you take that position -- so, there's a
12 presumption, sometimes called a "heavy presumption," that
13 terms that have an ordinary meaning, like "URL" or
14 "storage location" -- because a patent is a technical
15 document written for a technical audience, you would
16 expect there to be a presumption that the ordinary
17 meaning of the term would apply in the claims. But when
18 you come to a term like "compilation file" which has no
19 ordinary meaning -- I mean, it -- you know, when I asked
20 Dr. Porter --

21 THE COURT: How does "compilation" have less
22 of an ordinary meaning than "storage location"?

23 MR. PITCOCK: Well, if I say to one of skill
24 in the art, "I am going to store this at a storage
25 location," one of ordinary skill in the art knows what

1 that means. They know what it means to some degree
2 before you look at the specification. And they wouldn't
3 necessarily think it had to be in whatever you're calling
4 a "facility," which is some undefined term that they're
5 introducing from the specification. One of ordinary
6 skill in the art wouldn't have -- and they've introduced
7 no evidence that one of ordinary skill in the art would
8 think, oh, well, a compilation file would -- you know,
9 it'd be known in advance what that means to a person just
10 reading the patent who looked at the claims and didn't
11 read the specification.

12 THE COURT: I would agree that I think that
13 "compilation" is generic, and we've I think added in
14 the -- what we think is the patent specific meaning of
15 it, but what you're asking us to add in is the way in
16 which it's compiled.

17 MR. PITCOCK: I mean, I would disagree. I
18 would argue that it is a compilation file because it is
19 compiled, because it is assembled by the processor which
20 is what's called for in the claim.

21 THE COURT: Okay. Well, I do -- I understand
22 what you're asking. So, I appreciate that.

23 MS. DAVIS: Sharon Davis for the defendants,
24 your Honor.

25 THE COURT: All right.

1 MS. DAVIS: Let me start, your Honor, by
2 addressing one of the comments that Mr. Pitcock just made
3 with respect to plaintiff's Slide 16 where he cited to
4 what he said was a definition of "compilation file" as a
5 "file that is compiled (or assembled) by a processor."
6 That's the third bullet point on his slide. And he cited
7 to the joint claim construction statement, and he said
8 there was a definition in the joint claim construction
9 statement that supported this position of what a
10 compilation file is.

11 Your Honor, this was not something that was
12 cited in any of the briefing; but if you look at the tab
13 in plaintiff's binder where he has the joint claim
14 construction statement and you turn page 6, the
15 definition of "compilation," there's two things I want to
16 point out to you about that, your Honor. The first one
17 is that this is not something that was agreed to.
18 Actually it's plaintiff's citation of their proposed
19 construction in support for their claim construction.
20 So, when he says it's in the joint claim construction
21 statement, he's just pointing to what plaintiff included
22 in their joint claim construction statement although he
23 didn't cite to this in any of the briefing that they did
24 on claim construction so far.

25 But more importantly, if you look at the

1 definition that they're citing to, they're citing to the
2 Oxford dictionary's definition of the word "compilation."
3 And all that that definition says, your Honor -- I'm not
4 going to read the whole thing -- but it says that
5 "compilation" is (reading) an action or process of
6 producing something like a list by assembling information
7 collected from other sources, which I think is what we
8 all understand as the ordinary meaning of compiling
9 something. There's nothing in that definition that
10 they're citing to from the joint claim construction
11 statement that says anything about a processor or being
12 compiled by a processor or being assembled by a
13 processor.

14 But turning back to the substance of the main
15 argument, your Honor, if we could look at Slide 65 and
16 just look at the claim language for a moment. And I know
17 your Honor has focused on this point in the discussion.
18 But the claim language here specifically assigns two
19 tasks to the processor in claim 31. The "one or more
20 processor" are "for"; and there are two relevant tasks
21 that are assigned here, "storing one or more media files"
22 and then there's some information relating to the storage
23 of those media files and then "from time to time, as new
24 episodes become available, storing an updated version of
25 a compilation file."

1 The claim language is quite clear that what
2 the processor is to do is to store an updated version of
3 a compilation file. It doesn't say anything and is
4 completely agnostic as to how that updated version of a
5 compilation file is created.

6 As your Honor pointed out in addressing it
7 with Mr. Pitcock, the claim could have put in language
8 about how that compilation file was created; but they did
9 not do so. They put in a broader claim here that covers
10 a processor for storing an updated compilation file
11 regardless of how that compilation file is created, and
12 it would be reading in an additional limitation to the
13 claim to adopt plaintiff's construction.

14 If we turn to the specification, the next
15 slide.

16 We can go forward one more -- well, let me
17 actually point out this point.

18 You know, plaintiffs are really kind of trying
19 to have it both ways here in terms of reading things into
20 the claim; and they even make the point in their reply
21 brief that the claim itself "specifically sets out the
22 required elements of the compilation file." And we agree
23 it does. It has a pretty lengthy description of what
24 needs to be in the compilation file, and it is plaintiffs
25 who are trying to add yet another element to what it

1 takes to be a compilation file by adding the concept that
2 it has to be a file that is assembled by a processor,
3 which is simply completely missing from the claim
4 language.

5 If we turn to Slide 68 with respect to the
6 specification -- and we addressed this, your Honor, in
7 our opposition brief -- even when plaintiffs turn to the
8 specification, they have a really hard time even finding
9 language that supports the idea that the compilation file
10 has to be assembled by a processor because what they
11 quote to your Honor in their opening brief is a very
12 small segment of what's included in these passages
13 because what the passages -- and they only found two
14 passages in the 52 columns of the specification that they
15 contend would support reading in this limitation and what
16 they did was to kind of clip out the part of the sentence
17 that talks about compiling a file, but what they left out
18 was the fact that these are clearly in the context of
19 these specific embodiments where actually the embodiment
20 was requiring different elements that are not encompassed
21 by claim 31 at all. For example, the inclusion of
22 additional types of programs and in particular the
23 requirement that the user supply information in order to
24 create the compilation file, which is not something
25 that's encompassed by claim 31 at all.

1 Now, in their briefing -- although Mr. Pitcock
2 didn't mention it, in their briefing -- in their
3 briefing, Personal Audio points to the claim 3 and
4 suggests that the fact that there is reference to the
5 processor being involved in the creation of the
6 compilation file in claim 3 supports reading in the
7 limitation they propose. It's actually quite the
8 opposite, your Honor. What claim 3 and claim 1 show is
9 that there were circumstances where the patentee chose to
10 claim a system that had the processor doing some of the
11 steps of updating, and they very clearly claimed that in
12 claim 1 and claim 3. It was specifically not included in
13 claim 31 which again only requires that the processor
14 store the updated compilation file and doesn't include
15 any steps that relate to the assembly or compilation of
16 the computer file.

17 Finally, I just want to address one of the
18 things that Mr. Pitcock argued because he made reference
19 again to the reasons for allowance and suggested that
20 that somehow supported reading in this limitation; and I
21 just wanted to point out that if you actually read the
22 entire segment of the reasons for allowance -- the first
23 paragraph is what Mr. Pitcock quoted from; but if you
24 look at the second paragraph where the examiner was
25 explaining a little bit about the reasons for allowance,

1 the examiner says that the closest prior art discloses a
2 method for updating, for distributing updates, and then
3 says Reisman does not disclose the objects being a
4 compilation file representing episodes with corresponding
5 URLs of media files of said episodes. So, what that's
6 saying, to the extent the examiner was expressing any
7 opinion here on what was novel over the prior art, the
8 examiner was suggesting that it was the specifics of
9 having compilation files representing episodes with
10 corresponding URLs of those episodes that was the
11 novelty. It doesn't say anything about it being novel to
12 update using the processor.

13 If your Honor has any questions, I'd be happy
14 to address them. Otherwise, I'll rest on that. And
15 that's for both of those two claim terms.

16 THE COURT: All right. Thank you, Ms. Davis.

17 MR. PITCOCK: Your Honor, if I might briefly
18 just address one thing.

19 THE COURT: All right.

20 MR. PITCOCK: If you look at their Slide 65 --
21 it really doesn't matter; it's just a snippet of this
22 language. You know, there's really no reason to call it
23 a "compilation file" if you're not trying to point back
24 to the part of the specification which describes, you
25 know, the compiling. There's no reason -- you could just

1 call it a "file." And yes, we do cite to just the
2 portions of the spec that talk about a compilation file
3 because that's obviously the part of the specification
4 that this claim is referring back to. "Compilation file"
5 wouldn't be a term you would use because it had some
6 ordinary meaning to one of skill in the art. You would
7 be using it because you want to refer to the compilation
8 file in the specification.

9 THE COURT: All right. Thank you.

10 MS. DAVIS: Your Honor, I just want to address
11 real quickly what Mr. Pitcock just said, which is the
12 compilation part of this file is not how it's compiled in
13 the sense of a computer compiling things. It's a
14 compilation file because, as it indicates here, it's a
15 list of the currently available episodes. It's compiling
16 what content is available and putting that in a file
17 which you then have to select from among the available
18 files. So, it's using compilation in the ordinary
19 meaning -- not in the computer context but in the
20 ordinary meaning of what it means to compile a list of
21 episodes.

22 THE COURT: Okay. Mr. Pitcock, the next term,
23 do you wish to address it?

24 MR. PITCOCK: Your Honor, I'll actually -- I
25 think it makes sense to address the last two phrases

1 together. They're both part of the end of claim 31. And
2 looking at the observation underneath the plain and
3 ordinary meaning, you observe "that the language of the
4 claim suggests the same interface must perform a, b, and
5 c, but other interfaces may also perform one or more of
6 those functions as well." And I would just -- you know,
7 I agree obviously with the second part of the phrase; but
8 the notion that the same interface has to perform all
9 three functions I think is actually put to the lie by the
10 fact that the same claim earlier specifically talks about
11 one or more interfaces for performing, you know, these
12 functions that are then being listed.

13 So, I would respectfully suggest that the
14 claim language which talks about employing one of them
15 wouldn't mean that you had to use the same one to perform
16 all of the same functions that are part of this phrase
17 which specifically talks about one or more interfaces for
18 performing those functions and that the claim language of
19 31 makes it clear that if you're going to read, you know,
20 "one" as a single limitation, that it makes much more
21 sense to say one of the interfaces has to perform a, one
22 interface has to perform b, and that another different
23 interface may perform c.

24 THE COURT: And tell me why. And the reason I
25 put the observation in this preliminary construction is

1 because I believe that the parties were differing on this
2 point and I wanted to make sure that it gets addressed
3 here. So, tell me what your support is for your position
4 that it should be construed to mean simply any one of the
5 interfaces has to perform each of the functions but no
6 single interface has to perform all three.

7 MR. PITCOCK: I think -- so, my primary
8 argument is the claim language itself. Unfortunately,
9 the exact term "communication interface" does not appear
10 to be used in the specification. So, looking at the
11 claim language itself, it says specifically "one or more
12 communication interfaces" for performing certain
13 functions. And then it goes on, in the disputed
14 language, to say "employing one of them to"; and then it
15 breaks out these three different parts. And I would
16 suggest it is actually suggesting that one interface
17 could perform a, one interface could perform b of the
18 potential for having more interfaces, which is directly
19 referenced in the earlier part of the claim, and yet
20 another interface could perform c. They could all be the
21 same one, but they don't have to be.

22 And that's consistent, your Honor, with my
23 understanding of the *IGTv/Bally* case which is, you know,
24 a case where you have a limitation to one and the
25 defendants, just as they are here, are trying to say,

1 well, no, the fact that there's one interface claim here
2 means that all these things have to be done by one
3 interface all the time. And here I think it's very clear
4 from the language of the claim, which specifically
5 contemplates having more than one communication interface
6 for performing these functions and then breaks them out
7 into three different things, that what it's really saying
8 is yes, one does this, one does b, one does c but it
9 doesn't have to be the same one.

10 THE COURT: If you think that's clear, then
11 I --

12 MR. PITCOCK: No, it -- I'm just saying it's
13 the only way to reconcile -- why would you claim
14 specifically one or more communication interfaces and
15 then at the end say you had to use one of them for
16 performing all of the same -- you know, for performing
17 the same functions that you had more than one for earlier
18 in the claim? And I guess that's the logical point.

19 I admit this is not going to go into any
20 journals as an example of claims drafting that should be
21 emulated; but in terms of looking at the claim as a whole
22 and trying to interpret this phrase in the context of the
23 earlier part of the claim which specifically contemplates
24 having more than one communication interface for
25 performing these functions, it seems that the better read

1 is that one has to perform a, one has to perform b, one
2 has to perform c but they don't have to be the same one.

3 THE COURT: And I guess what I'm after is
4 whether you have anything you can point to in the
5 specification or elsewhere that sheds light on this or
6 whether you're just trying to do the same thing I'm doing
7 of giving the most logical meaning to this language.

8 MR. PITCOCK: So, the thing that I would note
9 is yes, although it's not direct. As I said before,
10 "communication interface" isn't directly used in the
11 specification; but the claim also requires -- I'm sorry,
12 your Honor.

13 So, the claim specifically talks about having
14 media files and data storage servers; and the question
15 is, depending on your construction of "communication
16 interface" -- whether or not you believe, you know, it
17 specifically contemplates having those stored anywhere on
18 the Internet, it's at least conceivable that you would be
19 using a different communication interface to get those
20 files than you might be otherwise. And, so, that's why
21 it claims more than one interface for performing the
22 functions and that's why that language at the end of the
23 claim is better read as saying one of the interfaces has
24 to perform the specific broken-out functions that are
25 listed there, but it doesn't have to be the same one that

1 performs all three.

2 THE COURT: Well, why would it say -- bother
3 to say "one of said one or more communication interfaces"
4 at all? Why wouldn't it just then say "employing said
5 communication interfaces to" -- what's the -- in your
6 mind, what's the purpose of saying "one of said one or
7 more"?

8 MR. PITCOCK: I think it's that the -- I
9 believe the proper interpretation is that one interface
10 would perform each of the functions but it wouldn't have
11 to be the same interface.

12 THE COURT: Well, then why call out -- why add
13 that term "one of said one or more"? It's obvious that
14 some communication interface would be performing it. So,
15 why specify that it has to be "one of said one or more"?

16 MR. PITCOCK: Well, I think it's that -- I
17 honestly believe that it's probably because each of the
18 different functions could be -- would be performed by one
19 interface but wouldn't have to be performed by the same
20 one interface.

21 THE COURT: Okay. I appreciate that.

22 MR. LO: Jason Lo on behalf of the defendants,
23 your Honor.

24 I think your Honor hit the nail on the head
25 when you asked about the phrase "one of said one or

1 more." There's a specific reason that that phrase is in
2 there. But I think there's something else that goes
3 toward making the first part of your Honor's proposed
4 construction correct, and that's the other part that I've
5 highlighted on Slide 74. The a, b, c are connected by an
6 "and"; and that clearly states that the same
7 communication interface for a, b, and c must be the one
8 that is applicable.

9 Mr. Pitcock also made the argument that
10 because the communication interfaces here has an
11 antecedent basis, it's a set one or more; and up above in
12 the claim and specifically in about line 39 of column 50
13 they do describe other communication interfaces that
14 therefore if they are defining multiple communication
15 interfaces, it makes no sense to say in the last part of
16 the claim 31 that only one of those are used. All I'll
17 say to that is what is described in line 39 of column 50
18 is a broad -- is a broad description of things that
19 communication interfaces can do. Then when you get down
20 to the part in column 51, there are specific tasks
21 relating to a compilation file in subpart A, relating to
22 the updated version of the compilation file in subpart B,
23 and relating to issues relating to episode URLs included
24 in the attribute data contained in the updated version of
25 said compilation files. Sorry. That's a mouthful.

1 But the point is in a, b, and c on column 51
2 there are much more specific things that a communication
3 interface described in column 51 and the end of column 50
4 must do. And that's why just because you have the
5 antecedent basis up above doesn't mean that you have to
6 use every type of that antecedent basis in order to
7 conduct the functionalities that are at issue in
8 column 51, the a, b, and c functionalities.

9 So, with respect to the first part of your
10 Honor's construction that the claim suggests the same
11 interface must perform a, b, and c, we agree that that is
12 the correct construction of the term.

13 THE COURT: And do you also agree that if a
14 single interface is performing a, b, and c, that the
15 claim would allow other interfaces to also perform those
16 functions?

17 MR. LO: I disagree with that.

18 THE COURT: Okay.

19 MR. LO: And for this reason.

20 THE COURT: Tell me.

21 MR. LO: Your Honor's proposed construction
22 would be correct if the claim said "employing the same
23 communication interface to conduct a, b, and c." So, let
24 me just take it out of the vague language of a
25 "communication interface." I'm going in the next few

1 weeks to Dallas, Tyler, and New York. If I said I'm
2 bringing the same jacket on all three trips, that leaves
3 open the possibility that I may bring another jacket with
4 me on one or more of those trips but it has to be the
5 same. At least -- there has to be one jacket that goes
6 on all three of those trips. That's not what the claim
7 language here says.

8 The claim language, as Mr. Pitcock points out,
9 starts with the antecedent basis in column 50 at line 39
10 defining that there can be multiple communication
11 interfaces; and it defines, as a starting point, that I
12 have a closet with multiple jackets. And then when you
13 get down to the end of column 50 and the beginning of
14 column 51, it says out of the multiple jackets that you
15 have, you're bringing one on those trips. That doesn't
16 leave open the possibility that you bring more than one.
17 It specifically says that you will be only bringing one
18 and using one for those functionalities.

19 And, so, when you define in the antecedent
20 basis up above the possibility that there are multiple
21 and then you come down later into the claim and you say
22 that there is -- you're going to bring one jacket out of
23 the many jackets on your trip, that means you're not
24 bringing any other jackets; and it doesn't leave open the
25 possibility that another communication interface will

1 perform a, b, or c.

2 That, I think, your Honor, is supported not
3 only just by the claim -- reading of the claim language;
4 but if we go to Slide 75, this issue has been squarely
5 addressed by the Federal Circuit on multiple occasions.
6 In *WMS Gaming versus International Game Technology*, the
7 products at issue were slot machines and one of the
8 issues for slot machines is you need to have a good
9 random number generator so that not everybody who goes up
10 wins a jackpot and, you know, at the same time, some
11 small percentage of people I guess will eventually win
12 the jackpot. It's never been me.

13 And one of the claim limitations was
14 "selecting one of said numbers." So, the claims in the
15 specification first describes the machine is going to
16 generate a small subset of numbers and then you're going
17 to select one of them. And I think what was at issue
18 there was the accused device selected more than one but
19 the claim said "selecting one." And the Federal Circuit
20 agreed with the district court, "The plain meaning of
21 'selecting one of said numbers' is selecting a single
22 number, not a combination of numbers." So, that's
23 squarely on point on this issue.

24 The other case -- and it's the case that
25 Mr. Pitcock referenced in his argument -- is *IGT versus*

1 *Bally Gaming*. The claim language there said "issuing a
2 command over the network to one of said preselected
3 gaming devices responsive to a predetermined event." And
4 again in this case it's a gaming device, and there were
5 really two questions at issue here.

6 The first question was: Does the claim
7 language allow you to issue more than one command? And
8 then the second question is: Can the command be issued
9 to more than one gaming device?

10 Now, the first one is actually, in my mind,
11 pretty easy because the command comes before the "one of
12 said preselected gaming devices." In other words, the
13 "one" modifies "gaming devices," not "command." So, when
14 it comes to the "command" language, Fed Circuit said,
15 "No, the claim does not limit the number of commands that
16 could be issued to discrete gaming devices." You could
17 issue multiple commands.

18 However, with respect to the gaming device --
19 and that's the phrase that is modified by the "one of
20 said preselected" -- the Federal Circuit said, "Certainly
21 the use of 'one' in this claim is limiting in that a
22 command will go to one of the preselected devices. The
23 command will cause one device to pay. Hence 'one'
24 modifies devices that will receive a particular command,
25 not the number of commands that might be issued."

1 So, both *IGT* and *WMS* are clearly on the side
2 that when the patentee says "one" and particularly when
3 the patentee says "one of said multiple ones," "one" has
4 to have meaning. It doesn't leave options open for more
5 than one; it doesn't leave options for different ones.
6 It's got to be a single one and only one that performs a,
7 b, and c.

8 THE COURT: And that's really what you want is
9 for us to read it as though it says "only one."

10 MR. LO: That is correct. And so -- and your
11 Honor is correct, and we appreciate your Honor making the
12 observation. The dispute here is both aspects of your
13 Honor's observation. We agree with the first aspect that
14 the same one has to do a, b, and c. We respectfully
15 disagree with the second aspect of it that leaves open
16 the possibility that another communication interface will
17 perform a, b, or c in addition to the one that does all
18 three. I think that's -- those are really the two
19 disputes; and that is what we are seeking a ruling on, on
20 those two issues.

21 THE COURT: All right. I understand your
22 position.

23 MR. PITCOCK: Oh, actually I just -- I wanted
24 to briefly address *IGT* and --

25 Did you have something more to add?

1 THE COURT: All right. I'll give the
2 defendants a chance to respond after, but go ahead.

3 MR. PITCOCK: Okay. Yes, your Honor.

4 So, if you look at our reply brief, we talk
5 about the *IGT* case. And again, they're right. They --
6 but there was another dispute which is that the question
7 is certainly the use of "one" talks about using, you
8 know, a command or more than one command to one device at
9 a time, but the court specifically held "a single command
10 must be issued to a single gaming device." "The claim,
11 however" -- and I'm reading from the top of page 10 --
12 "does not limit the number of commands that could be
13 issued to discrete gaming devices." Nothing in this
14 limitation requires issuing only one command to only one
15 machine. *Bally* would have us rewrite the claim to say
16 "issuing only one command to only one of said preselected
17 gaming devices."

18 So, there they were arguing the same thing
19 here, that use of the word "one" meant that, you know,
20 you had to, you know, all the time just use one
21 interface. And here, unlike *IGT/Bally*, you know, there
22 wasn't a previous part of the claim that specifically
23 said that you had, you know, the possibility of having
24 more than one communication interface. And just as it
25 did here -- they're really misciting this. The court

1 specifically held that you just didn't -- you didn't have
2 to send it to only one of the preselected gaming devices.
3 You could have other -- you could have other winners in
4 the *IGT/Bally* case and still infringe the claim. Just
5 like you could take other jackets on the plane even if
6 you said, you know, only one jacket on a plane. And here
7 where the claim language specifically calls out different
8 functions and it says (reading) employing one of these
9 communication interfaces to perform this function, that
10 function, and the other function, it doesn't mean that
11 "and" just means you have to have one interface that
12 performs each function. It does not mean that you
13 necessarily have to have the same interface perform all
14 three.

15 THE COURT: All right. I understand your
16 argument.

17 MR. ACOSTA: Your Honor, Matt Acosta for
18 defendants again. I'm addressing the last term, and the
19 critical language there is "receiving and responding."

20 I'm using the document camera.

21 We've seen that the court has a preference
22 saying that it doesn't want to import the "downloading"
23 language. We have two responses to that.

24 First of all, the dispute is not trying to
25 import the previously argued downloading issue into this

1 claim construction language. This is an independent
2 dispute from the "downloading" dispute. Regardless of
3 what the court decides "downloading" actually means in
4 this context, this dispute is absolutely separate.

5 The second thing I would like to point out is
6 that, respectfully, the court, if they adopted
7 defendants' construction, would not be importing
8 "downloading" at all into the claim because "downloading"
9 is already in the claim language.

10 THE COURT: So, we don't need to put it in
11 again?

12 MR. ACOSTA: Well, and that's exactly what the
13 dispute is, because plaintiffs have not clarified to us
14 and there seems to be an indication that they think the
15 phrase "receiving and responding" means something other
16 than responding to the request for a media file by
17 downloading; and they -- and we haven't heard either in
18 the briefing or informally from plaintiffs what that
19 might mean. But pointing to the claim language again,
20 right at the top when it talks about "one or more
21 communication interfaces" which later -- as we've just
22 heard, later down in the claim it says "employing one of
23 said one or more communication interfaces to do" a, b,
24 and c, the c being receiving and responding, going back
25 at the top of the claim when it talks about "one or more

1 communication interfaces connected to the Internet for
2 receiving requests" and then later it says "and for
3 responding to each given one of said requests by
4 downloading a data file identified by a URL." That's
5 what this claim says a communication interface does.

6 THE COURT: And does this language that we're
7 addressing here use "said request" like the language
8 you're quoting from?

9 MR. ACOSTA: Does the language -- excuse me,
10 your Honor. Does the language at the top of the claim
11 use "said request"?

12 THE COURT: No. The language at the top of
13 the claim does; but that you're comparing it to says
14 "said request," right?

15 MR. ACOSTA: Correct.

16 THE COURT: And the language that we're
17 construing in that subparagraph C says "a request."

18 MR. ACOSTA: It does say "a request," your
19 Honor; but the only request that's outstanding for it to
20 respond to is the request for a media file.

21 And if you go to the top of the claim
22 language, it says this is what communication interfaces
23 do and then later it specifies particularly what they're
24 doing and the very last c specifies that it's receiving
25 and responding to a request, the request being the

1 request for the media file.

2 THE COURT: Well, the fact that in the second
3 limitation of claim 31 it talks about responding by
4 downloading, how does that mean that here in this last
5 limitation the only response would be by downloading?

6 MR. ACOSTA: Well, there's a few reasons, your
7 Honor. First, because the claim limitation is clear that
8 communication interfaces receive requests and respond by
9 downloading and then also because of the specification
10 which many, many times talks about responding to a
11 request for a media file by downloading.

12 If we could jump to Slide 82.

13 Sorry. 83.

14 Okay. So, this is just one example; and all
15 of these are cited in our -- in defendants' response
16 brief from the specification that talks about downloading
17 in response -- downloading media files in response to
18 requests for media files. This is from the player side,
19 column 7, lines 19 through 22, and also column 24, lines
20 19 through 21.

21 And then if you go to the next slide, you have
22 the specification talking about it from the server side,
23 "downloading of actual program segments" and again "an
24 immediate request may be sent to the server to download a
25 needed but locally unavailable segment."

1 The issue being if it's responding to a
2 request from a media file, what else does this
3 specification or this claim language allow the
4 communication interface to do besides downloading? And
5 the answer is absolutely nothing. There is no indication
6 that it does anything besides download the media file in
7 response to each request for a media file.

8 THE COURT: All right. Mr. Pitcock?

9 MR. PITCOCK: I'll try to be very brief. I
10 would just say that, you know, to some degree they're
11 trying to have it both ways with this claim. They want
12 to read parts of the earlier, you know, plural interface
13 limitation into this but then read it out despite the
14 fact that the different functions are claimed in
15 different parts; and there would be no reason to do that
16 if you meant the same one had to do all of these things.

17 And I would also add that even if the response
18 also results in a download, it doesn't mean that's the
19 only thing that you can do in response; and there's
20 certainly nothing in the claim that indicates that that
21 download has to occur over the same interface as the
22 request.

23 THE COURT: Is there any other response that
24 you can describe to me other than a download?

25 MR. PITCOCK: Well, you might -- I mean, I can

1 contemplate lots of different things theoretically. If
2 you have a request for a URL, you might get all sorts of
3 information in response in addition to the download of
4 the file.

5 THE COURT: Okay. And you have said that
6 under your construction the resulting download could be
7 through a different interface? Is that --

8 MR. PITCOCK: Yes.

9 THE COURT: -- a concern you have?

10 MR. PITCOCK: And I believe that would be
11 contemplated -- if you have a storage location for media
12 files, you know, anywhere accessible by the Internet,
13 it's at least conceivable that you would be using a
14 different communication interface to download those
15 files, particularly with respect to whatever you're using
16 to receive requests.

17 THE COURT: Okay. Mr. Acosta, would you
18 address whether your construction would require that the
19 download occur through this same interface and, if so,
20 why that's justified?

21 MR. ACOSTA: Your Honor, I think this goes
22 back to the last limitation that we were arguing on. If
23 you look again at the claim language -- if you look again
24 at the claim language for claim 31, in column 50, right
25 at the bottom, again it says "employing one of said one

1 or more communication interfaces to" and then you have a,
2 b, and c, a being receiving a request from a client
3 device and c being thereafter receive and respond to a
4 request from said requesting client device. And, so --
5 first of all, as the court discussed earlier, the "one"
6 means one has to do a, b, and c; but then even more
7 poignant is that receive and respond to is all contained
8 in one limitation. It's all contained in c.

9 And then also Mr. Pitcock gave an example
10 saying additional things can be done in response but what
11 he didn't say is that downloading couldn't be done in
12 response and that's the point.

13 THE COURT: What he is suggesting and what I
14 guess is something that concerns me, he is saying the
15 response could include a download but that that download
16 doesn't have to be through this same interface. Your
17 construction would require that the download be through
18 this same interface. Is that what I'm understanding?

19 MR. ACOSTA: Yes, your Honor. It says "a
20 communication interface that must receive and respond to
21 a request," and then again earlier in the claim it says
22 "a communication interface to respond to a request by
23 downloading the media file."

24 And let me clarify my earlier statement that
25 this claim language said "media file," as your Honor

1 asked, but it says -- or excuse me -- "said request"; but
2 it's referring to a request from a client device,
3 received from a remotely located client device. So,
4 "said request" is pointing back to "remotely located
5 client device."

6 And once again, if you go down to part C of
7 the very last limitation, it's receiving a request from a
8 remotely located client device and responding to that
9 request by downloading, which is overwhelmingly supported
10 by the claim language, the description of the invention,
11 and then also the figures.

12 THE COURT: Okay. Thank you.

13 All right. In addition to the claim
14 construction issues, there's a motion to compel that is
15 pending that I'd like to address at this time. Who on
16 behalf of the plaintiff wants to address that?

17 MR. PITCOCK: Yes, your Honor. The motion to
18 compel, is that what you're wanting us to address at this
19 point?

20 THE COURT: Yes.

21 MR. PITCOCK: So, on October 10th, 2013, the
22 defendants served -- or some of the defendants served
23 their first set of invalidity contentions.

24 THE COURT: And let me interrupt a little bit.

25 MR. PITCOCK: Sure.

1 THE COURT: I have read the record on this and
2 I guess what I want you to address is I -- I've read
3 Judge Cousins' ruling on the motion that was filed in the
4 Northern District of California; and, frankly, my initial
5 impression on reading your motion was similar to one part
6 of his ruling in that it appears to me that until there
7 is a final ruling in the administrative proceeding, that
8 this is premature. Why do we need to get into this now?

9 MR. PITCOCK: Sure. So, first, in fact
10 discovery is going to end in this case in a month; and
11 the IPR is not going to be over or final for some time.

12 Two, that only goes to the preclusion issue.
13 If, for example, FOX which filed their complaint in
14 Massachusetts before the IPR was filed would be found to
15 be a real party in interest because of their
16 communications with the EFF, then the IPR would be over.
17 It would be finite right now. And without this discovery
18 we can't determine whether or not FOX may have, you know,
19 voided the IPR by being involved as a real party in
20 interest and filing their litigation in Massachusetts.

21 THE COURT: That would be an issue that I
22 would think would be appropriate to take up either in the
23 IPR or in the Massachusetts action, but how does that
24 relate to an issue before this court?

25 MR. PITCOCK: Well, that's really the second

1 point which is if you just took away the IPR altogether,
2 if you had no IPR pending and the defendants had just
3 communicated with a third party without any privilege
4 regarding their prior art claims, there would be no
5 reason to protect it and it would be directly relevant
6 because they may very well -- it's the same prior art in
7 the IPR that they have in their invalidity contentions.
8 So, I don't know what their communications are because
9 they haven't answered the interrogatory but I don't
10 believe that they're privileged in any way and if they
11 have to do with the credibility of witnesses, any
12 evidence that might support that this prior art wasn't
13 available, any problems with their case, anything like
14 that, then I believe that those communications are
15 relevant. They're not privileged, and there's no reason
16 why we shouldn't have access to them.

17 THE COURT: If they don't include the mental
18 impressions of their counsel about credibility or the
19 effect of prior art or some other such issue, then of
20 what use are they to you?

21 MR. PITCOCK: I'm sorry, sir?

22 THE COURT: What use are those communications
23 to you except for the mental impressions of counsel?

24 MR. PITCOCK: The facts. I mean, they're --
25 they have declarations in the IPR by supposed, you know,

1 declarants who were involved in the prior art, the same
2 prior art in our case. There could easily be facts that
3 were conveyed about each of these declarants that would
4 be useful in our case that would not be protected and
5 would have nothing to do with attorney work product.

6 THE COURT: If they're communications from
7 counsel, they would definitely be work product, would
8 they not?

9 MR. PITCOCK: They would be work product to
10 the extent that they contained, you know, mental
11 impressions or legal --

12 THE COURT: Mental impressions are just a
13 particular type of work product. They're not -- I mean,
14 work product is any document that's prepared in
15 anticipation or furtherance of litigation by the party,
16 the counsel, or a representative.

17 MR. PITCOCK: My understanding -- and it may
18 be erroneous -- is that there is a distinction drawn
19 between, you know, legal advice, legal -- you know,
20 mental impressions having to do with the legal theory of
21 the case and just factual matter that you put down even
22 in notes, that just because they're created by an
23 attorney doesn't necessarily make them work product.

24 THE COURT: I don't think that's correct. I
25 think that the work product doctrine does not protect the

1 information. It protects documents; and the information,
2 if it's otherwise discoverable, can be obtained through
3 other means. The mental impressions of counsel are given
4 special protection, and they're not discoverable without
5 some very strong showing that frankly I don't know if
6 I've ever seen but --

7 MR. PITCOCK: Well, unless they've been
8 waived, your Honor, by communication with a third party.
9 So, if the EFF isn't under a joint claim privilege and
10 they shared any of that information with the EFF, then
11 they have waived their work product privilege.

12 THE COURT: They would waive their
13 attorney-client privilege by doing that. I think the
14 work product is not as easily waived as attorney-client.
15 I think that all it takes is some showing that the
16 exchange was the sort of exchange that you would expect
17 parties and lawyers to make in the ordinary pursuit of
18 litigation. You can exchange documents with experts,
19 with insurance adjusters, with vendors, with lots of
20 people who would not be within the scope of the
21 attorney-client privilege but are taken not to waive work
22 product privilege -- we'll call it, even though I don't
23 know that it's technically a privilege -- but work
24 product protection under Rule 26.

25 But I -- anyway, if --

1 MR. PITCOCK: If -- I'm sorry, your Honor.

2 THE COURT: Well, I guess I'm trying to
3 distinguish if what you're after here is a very specific
4 sort of document, I -- maybe what I need to find out is
5 from the plaintiff -- I mean from the defense whether
6 they're -- whether they are withholding any response
7 whatsoever or only withholding certain kinds of
8 documents. Let me hear from them first.

9 MS. AINSWORTH: Your Honor, Jennifer Ainsworth
10 on behalf of the defendants. And I would point out just
11 procedurally that this motion was brought against
12 Defendants NBC and CBS, I believe, because there was a
13 discussion about FOX.

14 For the big picture, your Honor, the plaintiff
15 filed this motion to compel seeking discovery -- telling
16 the court that they're seeking discovery on whether the
17 defendants are the real parties in interest with this
18 organization the EFF for purposes of possible estoppel.
19 The problem is that they're moving to compel an answer to
20 an interrogatory, and that interrogatory doesn't even ask
21 that question. Instead, what they're seeking is a
22 narrative description of communications regarding prior
23 art which -- and they admit in their motion that this is
24 work product communication with a party that we believe
25 we share a common legal interest. So, therefore, we

1 believe that it's privileged communication. So, there's
2 not a request for production involved here; but, instead,
3 they've asked us for a narrative description of counsel's
4 discussions with the EFF. And if the court has a
5 particular question, I'll address that; or I can talk in
6 more general terms.

7 But there is one other procedural issue that
8 we wanted to update the court on because there was one
9 change in circumstance from the time that we filed our
10 response on Friday, which was that we learned late Friday
11 that the patent trial and appeal board of the PTO had
12 instituted or accepted the IPR. In our response we had
13 informed the court that that request was still pending,
14 but then we learned later it had been accepted. So, on
15 Monday we filed a notice with the court, which is Docket
16 No. 112, that showed that it was accepted.

17 And we will be preparing or we prepared a
18 motion to stay this proceeding on that basis. We'll be
19 meeting and conferring with the plaintiffs on that later.
20 But just that procedural point, we wanted to update the
21 court on.

22 THE COURT: All right. Other than the other
23 defendants in this litigation and perhaps the EFF, are
24 there other persons or entities with whom there have been
25 communications that fall within the description in this

1 interrogatory?

2 MS. AINSWORTH: Your Honor, there probably
3 have been communications with other third parties -- for
4 instance, potential prior art witnesses -- but those
5 aren't -- those were the subject of the interrogatory but
6 we met and conferred in person back in February on this
7 and several weeks -- six weeks or so later we got this
8 motion which appears to have moved away from those other
9 issues they were asking about and solely focused on the
10 discussion -- or any communications with the EFF with
11 regard to prior art.

12 THE COURT: Okay.

13 MS. AINSWORTH: So, I believe that's the scope
14 of the motion.

15 THE COURT: All right. Thank you. Let me let
16 Mr. Pitcock speak to that. Thank you, Ms. Ainsworth.

17 MR. PITCOCK: So, your Honor, they've produced
18 all their communications directly with third-party
19 witnesses. So, there's no reason to describe them in
20 response to our interrogatory or move to compel them. As
21 far as we know, they're not trying to withhold any of
22 their direct communications with third-party witnesses on
23 work product. It's only apparently their communications
24 with the EFF which, you know, it's obviously directly
25 relevant since they're seeking now to stay this case, you

1 know, in light of the IPR grant, you know, and if in fact
2 these communications aren't privileged and they should be
3 responding to the interrogatories to let us show that one
4 of the defendants might have been a real party in
5 interest, it could stop the IPR altogether and certainly
6 render their motion for stay moot.

7 THE COURT: Well, I am going to deny the
8 motion to compel at this point. I think the only
9 relevance it has at this stage to this case is premature.
10 I will, however, state for the record that I would direct
11 NBC and CBS to preserve the documents that are identified
12 in the interrogatory. In the event that the IPR results
13 in an outcome that puts the collateral estoppel effect at
14 issue, you can re-urge your motion and we'll take it up
15 at that time.

16 So, what I want to do is avoid the possibility
17 that the discovery is allowed at a later date and the
18 defendants represent that the documents have not been
19 maintained in between.

20 MS. AINSWORTH: We will certainly do that,
21 your Honor.

22 THE COURT: All right. Well, that disposes of
23 that motion; and we will issue a claim construction
24 ruling as soon as possible. I appreciate your
25 attendance. Thank you.

1 Ms. Ainsworth, is there anything else?

2 MS. AINSWORTH: I'm sorry, your Honor.

3 Everybody already stood up.

4 There was one minor housekeeping matter that
5 I'd like to bring to the court's attention to just flag
6 an issue for your Honor.

7 THE COURT: Go ahead.

8 MS. AINSWORTH: And this is several months
9 out. But we received an order or a notice from the court
10 the other day which moved the jury selection date to the
11 second week of September, I believe September 8th; and
12 because of that we just wanted to mention to the court
13 that when the court is looking at the trial date for this
14 case, there are dates later in September during which NBC
15 and CBS and FOX's lead counsel and other counsel have
16 religious holidays and would not be able to participate
17 in trial. Those would begin around September 24th. And
18 we know this is a long time off, but we didn't want to
19 surprise the court with that at the last minute. So, we
20 just wanted to alert you to that at this point.

21 THE COURT: And I appreciate that. Certainly
22 that's something that could affect where we put this case
23 in the order of cases on that September 8 docket. I'll
24 note at that time that you have brought it to our
25 attention now.

1 MS. AINSWORTH: Thank you, your Honor.

2 THE COURT: Thank you.

3 All right. Thank you, and we're adjourned.

4 (Proceedings adjourned, 12:02 p.m.)

5

6 COURT REPORTER'S CERTIFICATION

7 I HEREBY CERTIFY THAT ON THIS DATE, MAY 8,
8 2014, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
9 RECORD OF PROCEEDINGS.

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/s/
TONYA JACKSON, RPR-CRR

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